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No. 87-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FORD MOTOR COMPANY, et al.,
Petitioners

v.

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. DE LA RIGAUDIERE,
and DAVID C. SMITH,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

In an antitrust conspiracy case based upon circumstantial evidence that was previously remanded by this Court to the Court of Appeals, may summary judgment for the defendants be reversed where the Court of Appeals relies entirely on highly ambiguous and speculative evidence of conspiracy, fails to consider the absence of a plausible economic motive for the corporate entities to conspire, and thus effectively relieves plaintiffs of the burden of disproving the likelihood of independent action?

STATEMENT PURSUANT TO RULE 21(b)

Petitioners are Ford Motor Company, Ford Motor Credit Company, Wenner Ford Tractor, Inc., John S. Wenner, John Watson, Douglas N. Crawford, Eugene W. Fraher, E. S. Hasel, Hugh Nickel and Kenneth E. Harris.

Respondents are Tunis Brothers Company, Inc., Richard N. de la Rigaudiere and David C. Smith.

STATEMENT PURSUANT TO RULE 28.1

The principal affiliates and subsidiaries of Ford Motor Company (other than wholly owned subsidiaries or corporations in which all the stock not held by Ford Motor Company is held by dealers-operators of Ford products) are as follows: Ford Motor Company of Canada, Limited; Ford Brasil, S.A.; Ford-Werke, A.G.; Ford Motor Company (Belgium) N.V.; Ford Motor Company A/S; O/Y Ford A/B; Ford Motor Company Aktiebolag; Ford Nederland B.V.; Eleventh Taconite Company; Ford Lio Ho Motor Company Ltd.; Fairlane Town Center (A Partnership); Renaissance Center Partnership; Starnet Corporation; and Fairlane Woods Association (A Partnership). Ford Motor Credit Company is a wholly owned subsidiary of Ford Motor Company, with no subsidiaries (except wholly owned subsidiaries) or affiliates. Wenner Ford Tractor, Inc. is a Ford "Dealer Development" dealership, with Ford Motor Company presently owning 75% of the voting stock and 70% of the equity stock.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this action on July 15, 1987 (*Tunis* II).

OPINIONS BELOW

The opinions of the Court of Appeals are reported at 823 F.2d 49 (*Tunis* II) and 763 F.2d 1482 (*Tunis* I), and are reprinted in the Appendix to this petition.[1] A petition for Rehearing was denied in *Tunis* II, with four Circuit

1. References to the Appendix are cited herein as "A- ." *Tunis* II is reprinted at A-1 to A-8; *Tunis* I is reprinted at A-9 to A-52).

judges voting for rehearing *in banc*, in an unreported order. (A-70 to A-71). A petition for Rehearing was denied in *Tunis* I, with three Circuit judges voting for rehearing *in banc* in an unreported order. (A-72 to A-73). The opinion and order of the District Court granting summary judgment are reported at 587 F. Supp. 267, and are reprinted in the Appendix to this petition. (A-53 to A-67 and A-69).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals in *Tunis* II was entered on July 15, 1987. (A-1). A timely petition for Rehearing was denied on August 6, 1987. (A-70 to A-71). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents' complaint alleges violations of Section 1 of the Sherman Act, 15 U.S.C. §1:[2]

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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2. In addition to a Section 1 claim, respondents' complaint also alleges violations of Sections 7 and 14 of the Clayton Act (15 U.S.C. §§18, 24), along with pendent state law claims. Respondents' Clayton Act claims were dismissed by the District Court's Order granting in part and denying in part petitioners' motions to dismiss.

STATEMENT OF THE CASE

This case was brought by disappointed applicants for a Ford Motor Company tractor dealership in Kennett Square, Pennsylvania. They argue that their failure to be appointed as a tractor dealer resulted from an antitrust conspiracy between Ford Motor Company, Ford Motor Credit Company, and a neighboring dealership, Wenner Ford Tractor, Inc.

The corporate petitioners are three related entities: Ford Motor Company ("Ford"), which sells tractors through authorized dealers; Ford Motor Credit Company ("Ford Credit"), a wholly owned subsidiary of Ford, which finances, *inter alia*, tractors for authorized dealers; and Wenner Ford Tractor, Inc. ("Wenner Ford"), a Ford "Dealer Development" dealership[3] which sold tractors at a location approximately 11 miles east of respondents' business.

The individual petitioners are John S. Wenner, president and chief executive officer of Wenner Ford, and Messrs. Crawford, Fraher, Hasel, Harris, Nickel and Watson, who at all times relevant were Ford employees.

Wenner Ford is a majority owned subsidiary of Ford.[4] Because Wenner Ford is a Dealer Development

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3. Under the Dealer Development program, Ford provides capital where otherwise qualified operators lack sufficient funds to begin or continue to operate a dealership. In return, Ford takes voting stock and some equity stock, names a regional manager an officer of the dealership, and has membership on the board of directors. Over time, as the dealership prospers, its operator buys out Ford's interest and becomes fully independent. Independent dealers carry the great bulk of Ford's sales efforts. The record establishes that in 1984, for example, in its Northern Region (including Pennsylvania), Ford had 430 independent tractor dealers and only about 10 Dealer Development dealers.

4. At the time of the denial of respondents' dealership application, Ford owned all of the voting stock and 79% of the equity stock of Wenner Ford. This Court has already held that a parent and 100% owned subsidiary (such as Ford and Ford Credit) cannot be conspirators for purposes of the antitrust laws. *Copperweld Corp. v.*

dealership, Ford employees Fraher and Hasel have served at various times as officers and directors of that dealership, as provided in the dealership contract.

Respondent Tunis Brothers' long-time owner, Richard Tunis, operated both a hardware store and a Ford tractor dealership in Kennett Square, Pennsylvania, from 1959 until 1980.[5] At that time he sold his business to respondents de la Rigaudiere (Mr. Tunis' nephew) and Smith. Prior to the conclusion of that sale, Smith and de la Rigaudiere discussed with Ford their interest in obtaining the Ford tractor dealership for themselves. Indeed, under the dealership agreements a Ford franchise cannot be transferred without Ford's approval. Ford informed Smith and de la Rigaudiere that any purchase agreement they might sign should be conditioned on Ford approving a tractor dealership for them. Nevertheless, they ignored that warning and bought the Tunis Brothers business prior to any Ford approval and without conditioning the purchase on that approval.

After respondents entered into an Agreement of Sale with Tunis Brothers in December 1980, they sent Ford a business plan for review — knowing they needed Ford approval for the dealership. Mr. Tunis then sent Ford an unconditonal letter of resignation terminating his dealership agreement. Respondents allege that the induce-

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NOTES *(Continued)*

Independence Tube Corp., 467 U.S. 752 (1984). It remains an open question whether, as a matter of law, a parent can be held a co-conspirator with its own majority owned subsidiary. Because that issue has not been addressed directly by the courts below, it is not presented for review by petitioners here.

5. The franchise agreement between Ford and Tunis Brothers gave Ford the right to terminate the arrangement at will provided the dealer was given at least 60 days prior written notice. The arrangement could be terminated without notice if there was a transfer or an attempt to transfer ownership interest in the dealership. Additionally, the agreement provided that any change in ownership would be ineffective against Ford without its approval and that Ford could decline to appoint any purchaser as an authorized dealer.

ment for this letter was a statement made by Ford employee Nickel that the resignation would not be acted upon until Ford had approved the new owners' application.

Ford denied respondents' application for a Kennett Square tractor dealership in April 1981, but allowed reapplication upon discovery that Ford had reviewed the wrong financial information. A second review of respondents' application was then conducted. That review proceeded independently of the initial review and was based upon new and accurate information. Respondents' second application was denied in August 1981.

Ford personnel who rejected respondents' application testified under oath that they denied the application strictly for business reasons. Ford's marketing plan, developed in the mid-1970's, did not contemplate a Kennett Square location. Ford was the only tractor manufacturer with more than one tractor dealership in this geographic area, and it did not believe the area could support multiple dealerships. While located in Kennett Square, Tunis Brothers had sold an average of nine tractors per year in 1978-1980; the average Ford dealer within a 60-mile radius of Kennett Square sold three times that many. Ford believed that a better market for its tractors existed west of Kennett Square in the Cochranville, Pennsylvania area. Moreover, Ford had concerns that respondents would not succeed in Kennett Square. The tractor market was declining in the early 1980's and respondents carried a large debt load ($400,000/10-year mortgage) which they had assumed in purchasing Tunis Brothers.

The decision to reject the Smith/de la Rigaudiere dealership application was made by Ford and Ford alone. There is no evidence of any involvement by John Wenner or any other Wenner Ford employee.[6] Both

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6. The only "evidence" offered by respondents in this regard was that Wenner sat at a nearby table at a restaurant during a

Ford and Wenner Ford witnesses consistently so testified.

Shortly after denying respondents' Kennett Square application, Ford invited them to apply for a dealership in the nearby community of Cochranville, Pennsylvania. That location was consistent with Ford's pre-existing market plan, but respondents decided not to apply. Subsequently, at least for a time, Tunis Brothers became an Allis-Chalmers tractor dealer in Kennett Square, Pennsylvania.[7]

In their lengthy complaint, respondents allege that petitioners conspired to restrain trade by securing the resignation of Tunis Brothers and denying their application for a Ford tractor dealership. In addition, respondents allege that the dealership agreement constituted a contract in unreasonable restraint of trade and that petitioners' conduct constitutes a common law tort and a breach of contract.

Following extensive discovery, on November 30, 1983, the petitioners filed motions for summary judgment setting forth two principal grounds for entering judgment against respondents on their antitrust claims: (1) the absence of any facts showing or implying the existence of a conspiracy among petitioners, and (2) the

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NOTES (*Continued*)

luncheon discussion between petitioner Watson and respondents, Smith and de la Rigaudiere, and was alleged to be in an excellent position to overhear the conversation. Circuit Judge Hunter, dissenting in *Tunis* I, characterized this as nothing more than "an opportunity to conspire." (A-51).

7. Tunis Brothers' tractor sales in Kennett Square were primarily to mushroom farmers. Wenner Ford, in contrast, was selling primarily in the industrial market, not the mushroom market. In 1982, Wenner Ford moved from Concordville, Pennsylvania, to a location farther away from Kennett Square. Accordingly, its sales to the Kennett Square area went down; in 1982, Wenner Ford sold no medium industrial tractors to mushroom farmers in Kennett Square.

absence of facts showing an adverse impact on competition. The District Court agreed with petitioners on the first ground and held that respondents failed to proffer any evidence of conspiracy under Section 1 of the Sherman Act. The District Court further held that the dealership agreement between the parties did not violate the antitrust laws; nor was it improperly used by Ford to deny transfer of the dealership. The state law claims of respondents were dismissed without prejudice. The District Court made no holding regarding petitioners' second contention that respondents had failed to show any adverse impact on competition. *Tunis Brothers Company, Inc. v. Ford Motor Co.*, 587 F. Supp. 267 (E.D. Pa. 1984). (A-53 to A-67).

Respondents appealed to the Court of Appeals for the Third Circuit. Argument was held before Circuit Judges Hunter and Higginbotham and District Judge Debevoise. In an opinion written by Judge Higginbotham, to which Judge Hunter dissented, the Third Circuit reversed and remanded the case for trial on all counts. *Tunis Brothers Company, Inc. v. Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985) (*Tunis* I).[8] Noting that "summary judgments are somewhat disfavored in antitrust cases," (A-18), the majority placed the burden on defendants to present evidence supporting, beyond factual dispute, an inference of independent action. (A-40). The Court held that "if there is substantial factual evidence supporting *both* an inference of conspiracy *and* an inference of lawful conduct, and the crucial question involves motive, summary judgment is inappropriate." (A-40). Acknowledging evidence of an independent, lawful decision by Ford, the majority found that there was also evidence that certain Ford

8. Like the District Court, the Third Circuit declined to rule on petitioners' alternative ground for summary judgment regarding the respondents' failure to offer any evidence of adverse impact on competition resulting from petitioners' alleged conduct. (A-21 n.13).

employees, Fraher and Hasel, were officers and directors of Wenner Ford as well, and that they may have acted in either capacity in deciding to reject respondents' application. (A-36 to A-46). In addition, the majority held Ford capable of conspiring with its own Ford employees if these employees acted pursuant to their own "independent personal stake." (A-34 to A-36). Petitioners' timely request for rehearing was denied with three Circuit Judges voting for rehearing *in banc*. (A-72 to A-73).

Thereafter, petitioners filed a petition for writ of certiorari for this Court to review the judgment of the Third Circuit in *Tunis* I. On April 7, 1986, this Court granted the petition, vacated the judgment of the Third Circuit and remanded the case for further consideration in light of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986) ("*Matsushita*"). *Ford Motor Co. v. Tunis Brothers Co., Inc.*, ____U.S. ____, 106 S.Ct. 1509 (1986). (A-68).

Following submission of briefs, the case was reconsidered by the original Third Circuit panel, without additional oral argument. On July 15, 1987, in an opinion written by Judge Higginbotham, the Third Circuit again reversed the District Court's grant of summary judgment and remanded the case for trial on all counts, concluding that "the legal analysis of our initial opinion was consistent with the requirements of *Matsushita*." *Tunis Brothers Co. v. Ford Motor Co.*, 823 F.2d 49 (3d Cir. 1987) (*Tunis* II) (A-5). Judge Hunter dissented, emphasizing that the majority had "again failed to apply the proper legal standards to the facts of this case." (A-6 to A-7). Petitioners' timely request for a rehearing was denied, with four Circuit judges voting for rehearing *in banc*. Judge Becker, the author of the District Court opinion granting summary judgment in *Matsushita*, voted for rehearing *in banc* on the express

ground that "the result in this case is inconsistent with *Matsushita*." (A-71).

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Determine Whether, Upon Remand, the Court of Appeals Applied the Correct Standard to Infer an Antitrust Conspiracy

Despite remand by this Court, the Third Circuit has not changed its holding in this case. In the process, it perpetuates important antitrust law in conflict with the standard established by this Court for inferring an antitrust conspiracy from circumstantial evidence. If this erroneous decision is allowed to stand, it will establish a misinterpretation of *Matsushita* that (1) precludes district courts from using summary judgment to isolate and eliminate meritless antitrust conspiracy cases prior to trial and (2) permits factfinders to infer conspiracies from ambiguous evidence. In so doing, the decision will discourage, and potentially penalize, lawful, procompetitive business conduct. In light of these serious public policy implications and the likelihood that the appropriate standard of proof under Section 1 is an issue apt to recur frequently, immediate review by this Court is necessary.

A. The Standard Applied by the Third Circuit is Contrary to the Standard Set Forth by this Court in *Matsushita*

This Court previously vacated the Third Circuit's judgment and remanded this case for further consideration in light of *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). In *Matsushita*, this Court set forth specifically the standards lower courts must apply when deciding whether to grant summary judgment in antitrust conspiracy cases that do not involve direct evidence of

conspiracy. Building on its decision in *Monsanto Company v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), this Court articulated the following standard:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a Section 1 case. Thus in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of Section 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.

475 U.S. at ____, 106 S.Ct. at 1357 (citations omitted). In *Monsanto*, plaintiff claimed it had been terminated as a distributor by defendant in furtherance of a conspiracy to maintain resale prices. In reversing the Seventh Circuit, this Court held:

> On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded . . . .

465 U.S. at 763-64.

Matsushita and *Monsanto* therefore require courts, when faced with a motion for summary judgment in a Section 1 conspiracy case with no direct evidence of conspiracy, to examine the competing inferences derived from the available ambiguous evidence. The mere

existence of ambiguous evidence supporting an inference of conspiracy is not enough for plaintiff to overcome defendant's motion. Plaintiff must show that conspiracy is *more plausible* than independent action. 106 S.Ct. at 1356. *Accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, ____, 106 S.Ct. 2505, 2511 (1986) (a genuine issue for trial only exists when there is sufficient evidence favoring the nonmovant for a "fair-minded jury" to return a verdict for that party; "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted").

Furthermore, in *Matsushita* this Court expressly elaborated on what was only implicit in *Monsanto*, *i.e.*, that it is essential for lower courts to inquire into the defendants' motive to conspire in evaluating the evidence before it:

> [T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

106 S.Ct. at 1361. The Court reversed the Third Circuit in *Matsushita* in part because it "did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy." *Id.* Moreover, "in light of the absence of any rational motive to conspire," the ambiguous evidence relied on by plaintiffs to support the allegations of conspiracy did not create a "genuine issue for trial" under Rule 56(e). *Id.* at 1362.

This case is no different. Although the Third Circuit's second *Tunis* decision begins by reciting much of the above-described language of *Matsushita*, "the result

. . . is inconsistent with *Matsushita*." (Becker, J., dissenting from Order Denying Rehearing) (A-71). The standard employed by the Third Circuit here is in fact very close to the one it employed — and which was reversed — in *Matsushita*.

The majority opinion importantly concedes that "if one carefully prunes the record to uncover select facts" it can be said that "Ford's termination of the Tunis Ford tractor dealership is as consistent with an inference of permissible independent action by Ford Motor Company as it is with an inference of illegal conspiracy involving Ford." (A-4).[9] Under *Matsushita*, that finding is significant; for when conduct, standing alone, is "as consistent with permissible competition as with illegal conspiracy," an antitrust plaintiff cannot survive summary judgment. 475 U.S. at ____, 106 S.Ct. at 1357.

For reasons unclear, the Third Circuit opinion deviates from the *Matsushita* procedure and discounts the conceded evidence of permissible conduct. In the process, it relieves plaintiffs of their burden to rebut evidence of independent conduct by analyzing only the ambiguous, circumstantial conduct proffered in support of an inference of conspiracy — the very same conduct which it previously described as fully offset by evidence supporting an inference of independent activity.[10] Without any attempt to discuss the evidence of independent

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9. The majority decision mistakenly suggests that Ford "terminated" the Tunis dealership. However, this case was brought not by Richard Tunis, but by two purchasers of Mr. Tunis' business who were disappointed when their application for a Ford tractor dealership was turned down.

10. The majority has thus, in effect, "double counted" the same ambiguous evidence and thereby misstated and misapplied the *Matsushita* standard. It cites admittedly ambiguous conduct of Ford to say that the evidence "is as consistent with an inference of permissible independent action . . . as it is with an inference of illegal conspiracy . . . ." (A-4). Then, citing no other conduct (because there is no other), it says that plaintiffs have met their burden of presenting *additional* evidence that tends to exclude the possibility of independent conduct.

activity, which is both direct and circumstantial, the majority summarily concludes that "*appellants*' evidence tends to exclude the possibility that Ford acted independently, and it shows that an inference of illegal conspiracy between Ford and Wenner Ford is reasonable." (A-5). (Emphasis added). That contradicts the majority's own observation that Ford's rejection of the franchise application may be viewed as consistently "with an inference of permissible independent action by Ford Motor Company as it is with an inference of illegal conspiracy involving Ford." By attaching no significance to what it concedes to be evidence of permissible conduct, the Third Circuit improperly places the burden on defendants to prove an *undisputed* inference of independent activity, rather than requiring plaintiffs to prove that, on balance, an inference of conspiracy is more plausible.

The record in this case contains substantial evidence that the need for Ford to discontinue its Kennett Square site had independent business validity. The record shows that Tunis Brothers' sales performance had been poor at their Kennett Square site.[11] Additionally, Ford was the only manufacturer with more than one dealer competing in the general Kennett Square area. Ford had three. By the late 1970's — which pre-dates the decision to deny respondents' dealership application — Ford had decided to realign and consolidate those three dealers by eliminating the Kennett Square dealership and another nearby location. Ford's plan was to replace them with one new site in neighboring Cochranville or Oxford, Pennsylvania. Indeed, after rejecting respondents' application for Kennett Square, Ford invited respondents to apply for a different site

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11. Tunis Brothers was selling an average of nine tractors per year in 1978-80, while the average Ford dealer within a 60-mile radius of Kennett Square sold three times as many; and while Tunis Brothers had a 1980 Ford sales volume of $184,413, its surrounding Ford tractor dealers were grossing $1 million to $3 million.

consistent with Ford's marketing plan to have a dealer in the Cochranville area. Nothing could better demonstrate the sincerity of Ford's efforts to realign its dealerships and its lack of ill will towards respondents. For reasons unknown, respondents declined that offer.

In addition to these marketing considerations, Ford's decision was guided by another major concern: respondents' lack of financial soundness. Tunis Brothers had by choice focused its selling efforts on local Kennett Square mushroom farmers.[12] At a time when the mushroom industry was severely depressed and sales to mushroom farmers were declining, Ford was reluctant to approve a dealership in a location saddled with a new, $400,000/10-year mortgage obligation. Obviously, these facts strongly support an inference of independent, non-conspiratorial conduct.

The record is also barren of any evidence showing an economic motive for the corporate entities to conspire. Ford was free under the express terms of the dealership agreement to terminate Tunis Brothers at any time, with notice. Thus, Ford had no need to conspire with Wenner Ford to do that. In addition, Ford had no economic motive to conspire with Wenner Ford. Ford's interest is in selling as many tractors and having as many dealers as the market can sustain. The goal of Ford's long-time market plan was to relocate the Tunis dealership, not to terminate it.

Wenner Ford similarly had no economic motive to eliminate Tunis Brothers. Indeed, Wenner Ford had nothing to gain therefrom, because Tunis Brothers was selling to a completely different user market. It is

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12. Tunis Brothers' tractor sales were primarily to mushroom farmers. Wenner Ford, in contrast, was selling primarily in the industrial market, not the mushroom market. In 1979-80, for example, the mushroom business constituted considerably less than 5% of Wenner Ford's business.

undisputed that Wenner Ford's interest was in the industrial market, not the mushroom market. See note 12, *supra*.

The additional evidence supporting independent lawful conduct is even stronger. For example, after Tunis Brothers ceased operations as a Ford tractor dealer in Kennett Square, Wenner Ford relocated farther away from Kennett Square and closer to its own pre-existing market of industrial tractor users. See note 7, *supra*. Surely if Wenner Ford and Ford had conspired in 1981 to give Wenner Ford the Kennettt Square territory, Wenner Ford would not have moved away from Kennett Square once Tunis Brothers ceased operating as a Ford dealer.

As noted above, under *Matsushita*, the Third Circuit was required to consider respondents' claim of conspiracy in the context of this overwhelming evidence of independent, non-conspiratorial action by Ford and the lack of any evidence showing some eonomic motive to conspire. In direct disregard of *Matsushita*, the majority opinion gives short shrift to the evidence of independent action by Ford and, even more disturbingly, fails to consider the glaring absence of evidence of economic motive. Moreover, under *Matsushita*, in light of the concededly substantial evidence of lawful and independent conduct, respondents' burden to defeat the summary judgment motion should have been increased: "if the factual context renders respondents' claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with *more* persuasive evidence to support their claim than would otherwise be necessary." 106 S.Ct. at 1356 (emphasis added). The Third Circuit does not acknowledge this increased burden; to the contrary, it allows respondents to defeat the summary judgment motion on the basis of highly ambiguous, insubstantial evidence, from

which only speculative inferences could be drawn.[13]

The majority points to inconclusive evidence that Ford had a financial interest in its dealer development franchise, Wenner Ford, and that petitioners Fraher and Hasel wore "two hats" while serving as both Ford employees and officers of Wenner Ford. However, as Judge Hunter notes in dissent, such facts "do not establish the existence of an antitrust conspiracy. These facts establish, at most, the opportunity to conspire, which 'although relevant, is not enough to sustain an antitrust plaintiff's burden, and, without more, does not create a jury question on the issue of concerted action.' " (A-7 quoting *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 473 (3d Cir. 1985)).

The fact that Ford had a financial interest in Wenner Ford does not support a reasonable inference that Ford conspired, or was motivated to conspire, with Wenner Ford to eliminate Tunis Brothers' presence in Kennett Square. Indeed, the idea that Ford would have profited financially by eliminating Tunis Brothers is ludicrous in view of the fact that Tunis Brothers and Wenner Ford sold to distinct markets. Wenner Ford's lack of interest in the Kennett Square mushroom market is established by its decision to move away from that area

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13. Indeed, the majority reveals its own lack of confidence in the weight of evidence adduced by respondents: "The evidence adduced by appellants to satisfy [their] burden is substantial but not overwhelming." (A-4). Similarly, in *Tunis* I, the majority noted: "The plaintiffs present a plausible, albeit somewhat complex and dramatic, view of the facts . . . [W]hen viewed in the light most favorable to the plaintiffs, the facts *are susceptible of an inference* of concerted action." (A-32). (Emphasis added). This standard of "susceptibility" is clearly contrary to this Court's recent pronouncements in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986), that "the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient," *id.* at 2512, and that summary judgment is appropriate where the evidence is "merely colorable," *id.* at 2511.

shortly after the decision denying respondents' application. Moreover, its sales to that area subsequently declined.[14]

The fact that Fraher and Hasel wore "two hats" while serving as both Ford employees and officers of Wenner Ford is equally inconclusive. In fact, the District Court found that the record held no evidence of Fraher and Hasel acting in any capacity other than that of Ford employees when they decided to deny respondents' application. (A-64). The Third Circuit does not disagree. It finds only that those persons were named directors and officers of Wenner Ford. Presumably, although it does not say this, the majority finds that those neutral facts establish an opportunity to conspire. That, of course, is not sufficient evidence of conspiracy in fact by Fraher or Hasel; and the Third Circuit nowhere suggests there is such evidence. This reasoning effectively allows respondents to avoid summary judgment by simply raising the motive or opportunity issues. It improperly relieves them of their burden to present specific factual evidence of behavior tending to exclude the possibility of independent, lawful conduct.

Such analysis disregards this Court's admonition in *Monsanto* against inferences based on "highly ambiguous evidence." Nor can it be excused or based upon the "personal stake" exception to the rule against intracorporate conspiracies. Such reasoning, which is suggested by the majority's opinion in *Tunis* I, conflicts with the decisions of courts in other circuits which hold that mere speculation regarding a possible motive for an employee to conspire with his employer does not bring a case into the narrow confines of the "personal stake"

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14. The unreasonableness of the inference respondents seek is further evidenced by the fact that independent dealers make up the predominant group of Ford's dealers. See Note 3, *supra*. It makes no economic sense that Ford would conspire with its Dealer Development dealers to terminate or otherwise alienate independent dealers, which carry the bulk of Ford's sales efforts.

exception to the general rule. In *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942 (6th Cir. 1983), for example, in affirming a grant of summary judgment, the Sixth Circuit warned of the danger of ignoring the requirement that an antitrust plaintiff present *evidence* of an alleged personal stake:

> Under this exception, a conspiracy may be found to exist between a corporation and its employee by virtue of the employee's independent stake in achieving the object of the conspiracy. Without in any way endorsing the merits of this theory in general we hold that no such conspiracy is possible in the present case. There has been no showing to support even an inference of an understanding, explicit or tacit, between [the employer and its employees]. . . . A potential motive on the part of the [employees] is too speculative a basis upon which to infer an illicit combination. To apply this supposed exception for "independent stake" to the present case would be paramount to allowing the exception to subsume the rule.

Id. at 950-51. *See also Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 573 (6th Cir. 1986); *Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1317-18 (8th Cir. 1986); *H&B Equipment Co., Inc. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978).

Finally, the majority mistakenly relies on respondents' claims that "Ford employees tricked Tunis into resigning and caused [respondents'] application for the Kennett Square Ford tractor dealership to be rejected due to false financial information that Fraher had inserted into their dealership application." (A-5). Not only was this evidence rebutted by evidence offered by petitioners, but, in addition, such evidence concerns meetings between respondents and Ford employees, without any involvement by Wenner Ford. Accordingly, as Judge

Hunter correctly points out, this evidence "does not demonstrate a conspiratorial refusal to deal on the part of defendants, although it may well show a completely permissible unilateral refusal to deal." (A-7). Moreover, such evidence, even were it to be credited, does not support an antitrust claim; at best, it sets forth the rudiments of common law fraud.

In sum, the Third Circuit recognized evidence of lawful, independent activity and then set it aside in favor of inconclusive, ambiguous evidence, which is not sufficient under *Monsanto* and *Matsushita* to imply an illicit conspiracy between Ford and Wenner Ford. The effect of the Third Circuit opinion in *Tunis* is to relieve antitrust plaintiffs of the burden of presenting evidence tending to exclude the possibility that the manufacturer acted independently. If this Court had employed the standard set forth in *Matsushita*, the District Court's grant of summary judgment would have been affirmed. When the competing inferences are properly balanced, the evidence reveals that respondents' allegations of conspiracy are implausable. As Judge Hunter concluded in his dissent, "[t]he undisputed facts fully support Ford's contention that it acted independently in denying appellants the tractor franchise in Kennett Square, Pennsylvania . . . . Ford's decision to leave Kennett Square was economically rational and non-conspiratorial." (A-7).

B. The Third Circuit's Decision Will Preclude District Courts From Granting Summary Judgment in Appropriate Cases

The question of the appropriate standard of proof in Section 1 conspiracy cases is one that will undoubtedly arise frequently in future litigation.[15] Because the effect

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15. Section one of the Sherman Act has historically been the basis of much litigation. During the period from 1971 until 1984, for example, the number of private antitrust cases filed each year was

of the Third Circuit decision is to place the burden on defendants to prove an *undisputed* inference of independent activity, the decision will make it virtually impossible for defendants to obtain summary judgment in future Section 1 conspiracy cases. The message of the Third Circuit — explicit in *Tunis I* and implicit in *Tunis II*[16] — is that summary judgment is a disfavored procedural device that should not be utilized in antitrust cases, except in very limited circumstances. This message is contrary to the recent pronouncements of this Court,[17] as well as the decisions of other courts of appeals,[18] and scholarly commentary,[19] all of which

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NOTES *(Continued)*

between 1,000 and 1,600. Trade Reg. Rep. (CCH) No. 647, at 5 (October 31, 1984). During the year ending June 30, 1986, 838 antitrust suits were filed in the nation. *Annual Report of the Director of the Administrative Office of the United States Courts*, 1986, at 183. During the same year, 127 antitrust actions were filed in the district courts of the Third Circuit, and 25 private antitrust claims were heard by the Court of Appeals. *Id.* at 183, 166.

16. In *Tunis* I, the court stated that summary judgments are "somewhat disfavored in antitrust cases, especially when motive or intent is at issue." (A-18).

17. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct 1348 (1986); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 289-90 (1968). *See also Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2555 (1986) (asbestos products liability case) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just and speedy, and inexpensive determination of every action' ").

18. *E.g., In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 440 (5th Cir. 1982); *Weit v. Continental Ill. Nat'l. Bank & Trust Co.*, 641 F.2d 457, 464 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107 (5th Cir. 1979).

19. *E.g.*, P. Areeda and D. Turner, *Antitrust Law*, §316, at 57; Schwarzer, "Techniques for Identifying and Narrowing Issues in Antitrust Cases," 51 Antitrust L.J. 223, 226 (1982); "Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation," 90 F.R.D. 208, 226 (1981); Rogers,

recognize and encourage the use of summary judgment where appropriate in complex litigation and, in particular, in antitrust litigation.

As the Seventh Circuit noted in its decision in *Lupia v. Stella D'Oro Biscuit Co., Inc.*, summary judgment has an especially important role in antitrust cases:

> The very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also . . . the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation. The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way.

586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979) (citations omitted).[20] The decision of the Third Circuit below disregards these important public policy considerations and undermines the authority of the district courts to grant summary judgment in meritless antitrust cases. This erroneous decision will subject the parties to this litigation, as well as future antitrust litigants, to unnecessary and costly litigation. This Court should grant certiorari to prevent this result and to preserve the power of federal district court judges

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"Summary Judgments in Antitrust Conspiracy Litigation," 10 Loy. U. Chi. L.J. 667, 689 (1979).

20. The reference made in *Lupia* to the costly nature of antitrust litigation is well-documented. One commentator estimated that in 1979 $2.1 billion was spent for all private antitrust legal costs. Reich, "The Antitrust Industry," 68 Geo. L.J. 1053, 1068 (1980). A more conservative estimate places the current total annual cost of private antitrust litigation in the range of $250 million, which translates into an average cost of $200,000-$250,000 per case. Salop & White, "Economic Analysis of Private Antitrust Litigation," 74 Geo. L.J. 1001, 1016 (1986).

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to utilize summary judgment as a means of isolating and eliminating meritless antitrust cases.

C. The Third Circuit's Decision Will Discourage Legitimate Pro-Competitive Business Conduct

In *Monsanto*, this Court explained that a limitation on permissible inferences from ambiguous evidence alone is necessary to avoid the erosion of the holding in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), that a manufacturer's independent refusal to deal with distributors does not violate the antitrust laws. 465 U.S. at 763. Specifically, this Court held that: " '[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent judgment and emasculate the terms of the Statute.' " *Id.* at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)). Similarly, in *Matsushita* this Court again emphasized that "courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct." 106 S.Ct. at 1360. In rejecting the attempt of the respondents in that case to prove a conspiracy to suppress prices via indirect evidence of rebates and other price-cutting activities, this Court cautioned:

> [C]utting price in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. 'We must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.'

Id. at 1360 (citations omitted).

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The holding in the instant case will achieve precisely the result that this Court so strongly cautioned against in *Monsanto* and *Matsushita*. Despite the overwhelming evidence that the alleged conspiracy was implausible in view of the economic realities, the decision nonetheless permits the case to go forward and thus permits the factfinder to infer a conspiracy on the basis of conduct — realigning distributors to meet the competition of other manufacturers — that was economically rational and pro-competitive. The effect of the Third Circuit's decision will likely be to discourage, and potentially to penalize, the very kind of pro-competitive business conduct that the antitrust laws were designed to protect. Review by this Court is necessary to prevent the undermining of *Monsanto* and *Matsushita* and to provide a necessary elaboration of the policies and standards implicit in those decisions.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

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November 4, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.
de la RIGAUDIERE, RICHARD N. and
SMITH, DAVID C.,

Appellants

v.

FORD MOTOR COMPANY
FORD MOTOR CREDIT COMPANY
WENNER FORD TRACTOR, INC.
WENNER, JOHN S.
WATSON, JOHN
CRAWFORD, DOUGLAS N.
FRAHER, EUGENE W.
HASEL, E.S.
NICKEL, HUGH
HARRIS, KENNETH E. and
WENZEL, C.W.

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Submitted Under Third Circuit Rule 12(6)
May 12, 1986
Assigned May 12, 1987

Before: HUNTER and HIGGINBOTHAM,
Circuit Judges, and DEBEVOISE,
*District Judge.**

(Opinion filed: July 15, 1987)

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*Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

This matter is before us on remand from the United States Supreme Court. In our first encounter with this appeal, *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985) ("*Tunis Brothers I*"), we reversed the district court's order granting summary judgment in favor of the appellees and remanded this matter for trial on all counts. On April 7, 1986, the United States Supreme Court vacated that judgment, remanding the matter to us for further consideration in light of *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("*Matsushita*"). *Ford Motor Co. v. Tunis Bros. Co., Inc.*, ___ U.S. ___, 106 S. Ct. 1509 (1986). After considering supplemental briefs and memoranda filed by the parties,[1] we conclude that *Matsushita* does not require a new result. We will therefore again reverse the district court's order and remand all counts for trial.

I.

Matsushita addresses the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case. The plaintiff in such a case must produce evidence tending to show a conspiracy in violation of the antitrust laws and, in addition, tending to show injury to the plaintiff

1. After the Supreme Court remanded *Matsushita*, this Court issued its final opinion in that dispute. In re Japanese Elec. Prods. Antitrust Litig., 807 F.2d 44 (3d Cir. 1986). A petition for certiorari was subsequently filed, and we delayed deciding this appeal until that petition was denied on April 27, 1987. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., ___ U.S. ___, 107 S. Ct. 1955 (1987).

resulting from such illegal conduct. In general terms, according to *Matsushita*, the plaintiff's evidence must create more than "some metaphysical doubt as to the material facts." 475 U.S. at ___, 106 S. Ct. at 1356. If in the factual context of the case the plaintiff's claim is implausible -- that is, if the plaintiff's "story . . . does not make sense" as a matter of economic theory, 475 U.S. at ___ n.15, 106 S. Ct. at 1359 n.15; *accord In re Japanese Elec. Prods. Antitrust Litig.*, 807 F.2d 44, 47 (3d Cir. 1986) ("the Supreme Court deemed [the conspiracy alleged in *Matsushita*] economically senseless"), *cert. denied sub nom. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, ___ U.S. ___, 107 S. Ct. 1955 (1987); *Assam Drug Co., Inc. v. Miller Brewing Co.*, 798 F.2d 311, 317 (8th Cir. 1986) ("[t]he *Matsushita* Court noted the relevance of economic realities in evaluating summary judgment motions") -- then the plaintiff "must come forward with more persuasive evidence to support the[] claim than would otherwise be necessary." 475 U.S. at ___, 106 S. Ct. at 1356.

Of particular relevance to this appeal is the *Matsushita* Court's statement that, if the antitrust defendant's conduct is consistent both with permissible competition and with illegal conspiracy, evidence of such conduct "does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at ___, 106 S. Ct. at 1357. In such a situation, "[t]o survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of [Sherman Act] § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). In other words, such a plaintiff "must show that the inference of [illegal] conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff]". *Id.*

II.

Applying *Matsushita*'s summary judgment principles to this record,[2] it can -- if one carefully prunes the record to uncover select facts contained therein -- be said that Ford's termination of the Tunis Ford tractor dealership is as consistent with an inference of permissible independent action by Ford Motor Company as it is with an inference of illegal conspiracy involving Ford. The evidence can be interpreted as disclosing a legitimate plan by Ford to rationalize its tractor distributor network by eliminating Tunis, or the evidence can be interpreted as disclosing a vertical conspiracy between Ford and the Wenner Ford dealership to eliminate Tunis as a Wenner Ford competitor. Given this situation, in which the appellees' challenged conduct is as consistent with permissible competition as it is with illegal conspiracy, *Matsushita* teaches that it is appellants' burden at the summary judgment stage to produce evidence that tends to exclude the possibility that Ford acted independently and thus to show that an inference of illegal conspiracy is reasonable in light of the competing inference of independent action.

The evidence adduced by appellants to satisfy this burden is substantial but not overwhelming; we conclude that it meets *Matsushita*'s requirements. *Cf. Marsann Co. v. Brammall, Inc.*, 788 F.2d 611, 613 n.1 (9th Cir. 1986) ("*Matsushita* . . . discusses only the amount of evidence required to allow a factfinder to infer the existence of a conspiracy punishable under section 1 of the Sherman Act"). Instead of simply

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2. Because our initial opinion sets forth the facts of this case in great detail, *see Tunis Brothers I*, 763 F.2d at 1485-87, 1491-97, 1499, 1501, we see no need to repeat the record here. We do, however, readopt all aspects of that opinion's factual summary and analysis that are not inconsistent with this opinion.

terminating the Tunis dealership in a straightforward manner in order to streamline its dealership structure, there is substantial evidence from which it can be inferred that Ford, acting with Wenner Ford Tractor, Inc., engaged in trickery and chicanery in order to eliminate Tunis as a competitor of Wenner Ford. The evidence shows that Ford had a substantial financial interest in Wenner Ford. It also shows that two Ford employees, appellees Fraher and Hasel, served as directors and officers of Wenner Ford. In addition, there is evidence from which one may conclude that Ford employees tricked Tunis into resigning and caused de la Rigaudiere's and Smith's application for the Kennett Square Ford tractor dealership to be rejected due to false financial information that Fraher had inserted into their dealership application. When we consider, as we must, the record as a whole, appellants' evidence tends to exclude the possibility that Ford acted independently, and it shows that an inference of illegal conspiracy between Ford and Wenner Ford is reasonable. This is, in other words, a case where the "antitrust plaintiff[s] raise[] genuine issues of fact as to the existence of a common scheme or commitment, and the unlikelihood of independent action on the part of the defendants[. T]he issue of whether the defendants unlawfully conspired [therefore] belongs with the jury." *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985). The legal analysis of our initial opinion was consistent with the requirements of *Matsushita*.

III.

For the foregoing reasons, the judgment of the district court as to Counts I, II, III and IV will be reversed. Counts V and VI will be reinstated, and this case will be remanded for trial on all counts.

Hunter, *Circuit Judge, Dissenting*:

1. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Supreme Court concluded that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. . . . To survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of § 1 [of the Sherman Act] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." 475 U.S. 574, ___, 106 S. Ct. 1348, 1357 (1986) (citations omitted). *Matsushita* is consistent with the Supreme Court's other recent decisions clarifying the proper standards for deciding summary judgment motions. While summary judgment cannot be granted if any genuine issue of material fact remains for trial, it is now clear that no such genuine issue of material fact remains "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby*, ___ U.S. ___, ___, 106 S. Ct. 2505, 2511 (1986). Therefore, when ruling on a summary judgment motion, a judge must "view the evidence presented through the prism of the substantive evidentiary burden" that the parties must bear at trial. *Id.* at ___, 106 S. Ct. at 2513. If "the nonmovant will bear the burden of persuasion at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden of proof at trial." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987) (*in banc*) (citations omitted). The Supreme Court has expressly told this court to reevaluate its denial of summary judgment to the defendants in this case in light of *Matsushita*. Because I believe that the majority has again failed to apply the

proper legal standards to the facts of this case, I respectfully dissent.

2. The facts referred to by the majority -- Ford's financial interest in Wenner Ford and the fact that two Ford employees served as nominal directors of Wenner Ford -- do not establish the existence of an antitrust conspiracy. These facts establish, at most, the opportunity to conspire, which "although relevant, is not enough to sustain an antitrust plaintiff's burden, and, without more, does not create a jury question on the issue of concerted action." *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 473 (3d Cir. 1985). The rest of the evidence relied upon by the majority to deny defendants' motion does not demonstrate a conspiratorial refusal to deal on the part of defendants, although it may well show a completely permissible unilateral refusal to deal. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."). The undisputed facts fully support Ford's contention that it acted independently in denying appellants the tractor franchise in Kennett Square, Pennsylvania. Those facts demonstrate a long-standing marketing strategy on the part of Ford to move its Kennett Square dealership to another part of Pennsylvania. That marketing strategy was developed in response to the consistently poor showing in tractor sales by Tunis Brothers, as well as the generally declining market in tractor sales throughout the Kennett Square area. Ford's decision to leave Kennett Square was economically rational and non-conspiratorial.

3. I would affirm the judgment of the district court granting summary judgment to the defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.
de la RIGAUDIERE, RICHARD N. and
SMITH, DAVID C.,

Appellants

v.

FORD MOTOR COMPANY
FORD MOTOR CREDIT COMPANY
WENNER FORD TRACTOR, INC.
WENNER, JOHN S.
WATSON, JOHN
CRAWFORD, DOUGLAS N.
FRAHER, EUGENE W.
HASEL, E. S.
NICKEL, HUGH
HARRIS, KENNETH E. and
WENZEL, C. W.

Appellees

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D. C. Civ. No. 82-5557)

(Argued: Tuesday, January 15, 1985)
Before: HUNTER and HIGGINBOTHAM,
Circuit Judges, and
DEBEVOISE, *District Judge**

(Filed: May 30, 1985)

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*Honorable Dickinson R. Debevoise, United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*:

The plaintiffs in this "distributor termination" case, a franchised tractor dealership and its new owners, appeal a final order of the district court granting summary judgment in favor of the defendant franchisor and other corporate and individual defendants on plaintiffs' federal antitrust claims. The appealed from order also dismissed plaintiffs' state common law breach of contract and tort claims without prejudice.

We reverse and remand for further proceedings.

I. THE SUMMARY JUDGMENT RECORD

A. The Complaint and Other Pleadings

The six-count complaint filed by plaintiffs Tunis Brothers Company, Inc. ("Tunis Brothers"), Richard N. de la Rigaudiere ("de la Rigaudiere") and David C. Smith ("Smith")[1] on December 15, 1982 and amended July 14, 1983, includes four counts alleging violations of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982)[2]

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1. The use of the term "plaintiffs" in the plural will denote all three plaintiffs collectively. When the reference is to a single plaintiff it will be so specified.

2. Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . " Plaintiffs' claims brought under sections 7 and 14 of the Clayton Act, 15 U.S.C. §§ 18, 24 (1982), were dismissed by the district court's order dated June 22, 1983 granting in part and denying in part defendants' motions to dismiss. Tunis Bros. Co. v. Ford Motor Co., No. 82-5557 (E.D. Pa. June 22, 1983).

by three corporate defendants and eight individual defendants. The remaining two counts allege state common law tort and contract claims against the defendants and invoke pendent jurisdiction. The plaintiffs claim injuries to their business and property in the amount of $7,724,357 and seek treble damages from the defendants in the amount of $23,173,071. Appendix ("App.") at 11-94.

Count I alleges, *inter alia*, that corporate defendants Ford Motor Company ("Ford"), Ford Credit Company ("Ford Credit"), Wenner Ford Tractor, Inc. ("Wenner Ford"), and individual defendant John S. Wenner ("Wenner") conspired to terminate the authorized Ford tractor dealership of plaintiff Tunis Brothers, a Pennsylvania corporation located in Kennett Square, Pennsylvania. Complaint ¶ 66, App. at 35.

The business of Tunis Brothers had been established in 1934 by Richard M. Tunis and his brother Robert. In 1959, Tunis Brothers entered into an agreement with Ford[3] and became a franchised tractor dealership owned and operated by Richard Tunis and his wife Isabelle. From 1959 until April 1981 when its Ford dealership franchise was terminated, Tunis Brothers was an authorized dealer of Ford tractors and related equipment and it sold Ford tractors, Ford accessories and non-Ford products.[4] On

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3. The most recent franchise agreement between Ford, Ford Tractor Operations and Tunis Brothers is dated May 1, 1974 and is a "Dealer Sales and Service Agreement." Plaintiffs' Exhibit No. 1; App. at 2712. This franchise agreement remained in effect and governed the parties' relationship from 1974 to 1981.

4. Tunis Brothers was the only farm and industrial tractor dealer in Kennett Square, the "Mushroom Capital of the World." Complaint ¶ 28, App. at 21.

March 13, 1981,[5] plaintiffs de la Rigaudiere and Smith purchased the business and became the sole directors and stockholders of Tunis Brothers Company, Inc.

Count I further alleges that the defendants conspired to prevent plaintiffs de la Rigaudiere and Smith, the new owners of Tunis Brothers, from operating in Kennett Square to eliminate or substantially decrease competition with defendant Wenner Ford Tractor, Inc. Complaint ¶ 66, App. at 35-6.

Wenner Ford is a Delaware Corporation whose principal place of business prior to 1982 was Concordville, Pennsylvania, about 11 miles east of Kennett Square. Wenner Ford was the authorized Ford dealer of farm and industrial tractors, machinery, equipment and parts nearest Tunis Brothers. It is a Ford Dealer Development Company, established by Ford in November 1979, in which defendant Ford owns all of the voting stock and 79% of the equity stock. App. at 3522-37. Defendant John S. Wenner owned 21% of Wenner Ford's equity stock, app. at 3712-3883, and operated Wenner Ford as its president and chief executive officer pursuant to a Dealer Development Agreement and a Management Agreement.[6]
App. at 3434, 3449.

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5. There is a discrepancy in the date of purchase as alleged in the complaint at ¶ 6 which states "March 13, 1981" and as alleged in ¶ 51 which states "March 31, 1981". App. at 13, 29. The district court found that the date was March 13, 1981. Tunis Bros. Co. v. Ford Motor Co., 587 F. Supp. 267, 269 (E.D. Pa. 1984).

6. Ford's Dealer Development Program permits Ford and another party to invest in a dealership with the understanding that the other party will buy out Ford's investment within a reasonable time and become a private dealer. The terms of the agreement in this case included a provision that Ford would

It is alleged in Count 1 that, in addition to John S. Wenner, the other named individual defendants, employed by Ford in varying managerial capacities, participated in and aided and abetted the conspiracy. These individuals are: John Watson ("Watson"); Douglas N. Crawford ("Crawford"); Eugene W. Fraher ("Fraher"); E.S. Hasel ("Hasel"); Hugh Nickel ("Nickel"); Kenneth E. Harris ("Harris") and C.W. Wenzel ("Wenzel").[7]

It is further averred in Count 1 that the conspiracy and actions of the defendants were not only in unreasonable restraint of trade but were *illegal per se* because they were in furtherance of an illegal *horizontal territorial restriction* by Ford where Ford was in both a horizontal and a vertical relationship with Tunis Brothers, as both franchisor and competitor. Complaint ¶ 74, App. at 38.

Count II alleges that the 1974 franchise agreement between Ford and Richard and Isabelle Tunis constituted a contract in unreasonable restraint of trade due to the existence of certain unlawful provisions. The individual defendants are alleged to have aided and abetted Ford in exercising its rights under the agreement in furtherance of illegal objectives. Complaint ¶ 95, App. at 48.

Count III alleges, *inter alia*, that the franchise agreement and the conspiracy included "dirty business tricks and unfair business dealing . . . in furtherance of defendants' illegal antitrust objectives and their unreasonable restraint of trade . . ." Complaint ¶ 97, App. at 49.

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be the sole preferred stock shareholder of Wenner Ford and that John Wenner would be the sole common stock shareholder. *See* App. at 3464-71.

7. The district court granted defendant C.W. Wenzel's motion to dismiss all claims against him personally. Tunis Bros. Co. v. Ford Motor Co., No. 82-5557 (E.D. Pa. 1983).

Count IV avers that the franchise agreement and the conspiracy, by eliminating Tunis Brothers as a competitor, eliminated intrabrand competition in the sale and service of Ford products. Because no inter-brand competition of any significance or consequence was promoted by such elimination of intrabrand competition, it is alleged that the anti-competitive effect constituted an unreasonable restraint of trade. Complaint ¶ 100, 102; App. at 50, 51.

As to the state causes of action, Count V alleges tort liability under common law based on fraud and other tortious conduct. App. at 52-9. Count VI alleges contract liability on the part of the defendants at common law. App. at 60-5.

The defendants' answers and amended answers to the amended complaint deny all material allegations.[8]

B. Defendants' Rule 56 Motions

On November 30, 1983, the defendants filed motions for summary judgment pursuant to Rule 56[9] of the Federal Rules of Civil Procedure, with supporting

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8. *See* Ford Motor Company's Amended Answer to Plaintiffs' Amended Complaint, August 18, 1983, App. at 94; Ford Motor Credit Company's Answer to Plaintiffs' Amended Complaint, August 1, 1983, App. at 130; Amended Answer of John Watson, Douglas N. Crawford, Eugene C. Fraher, E.S. Hasel, Hugh Nickel and Kenneth E. Harris to Plaintiffs' Amended Complaint, August 18, 1983; App. at 112; Answer and Counterclaim of Defendants Wenner Ford Tractor, Inc. and John S. Wenner, App. at 139.

9. Rule 56(c) provides that summary judgment shall be rendered only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."
Fed. R. Civ. P. 56(c).

memoranda, affidavits, depositions and exhibits. App. at 200-900. The major argument presented by defendants was that there were no genuine issues of material fact in dispute and, on the basis of the undisputed facts, the plaintiffs not only failed to show direct evidence of a conspiracy but also failed to present facts which would permit a reasonable inference of conspiracy. Moreover, defendants argued that plaintiffs presented no facts showing an adverse impact on competition. They also asserted that there were no facts supporting plaintiffs' breach of contract claim.

In reply, the plaintiffs filed memoranda, affidavits, depositions and exhibits in opposition to defendants' summary judgment motions. App. at 900-1375. They argued in a 141-page brief that the factual record fully supported the allegations in the complaint and that there were genuine issues of material fact in dispute. The district court heard oral argument on February 8, 1984. App. at 1375.

In its May 7, 1984 memorandum opinion, the district court found that the plaintiffs failed to establish a ". . . contract or conspiracy, in restraint of trade" under section 1 of the Sherman Act in two respects.

First, the district court held that plaintiffs did not satisfy their burden of producing sufficient evidence of a conspiracy to terminate Tunis Brothers and to prevent de la Rigaudiere and Smith from operating the dealership as a franchise in competition with Wenner Ford. According to the district court, "there is no evidence of a conspiracy under section 1 of the Sherman Act" and therefore, "there is no genuine issue of material fact and all defendants are entitled to judgment as a matter of law on Counts I, III, and IV". *Tunis Brothers Co. v. Ford Motor Co.*, 587 F. Supp. 267, 274 (E.D. Pa. 1984).

Second, the district court determined that the 1974 franchise agreement, which contained provisions preventing Tunis Brothers from transferring the franchise without the approval of Ford and which gave Ford the right to terminate the agreement, was not a contract in unreasonable restraint of trade violative of section 1 of the Sherman Act. The district court also determined that "there are no facts which show that Ford improperly used the franchise agreement to deny transfer of the Ford franchise to plaintiffs de la Rigaudiere and Smith." *Tunis Brothers Co.*, 587 F. Supp. at 275. Summary judgment as to Count II was also granted.

Having dismissed all of the federal claims before trial, the district court then exercised its discretion and dismissed the pendent claims in Counts V and VI. 587 F. Supp. at 275.

The plaintiffs noticed this appeal on June 4, 1984.

II. STANDARD OF REVIEW

Although Tunis Brothers, de la Rigaudiere and Smith challenge the distict court's ruling as to the validity of the franchise agreement and the dismissal of the state claims, they have launched their major offensive against the district court's holding with respect to the entry of summary judgment on the conspiracy charge.[10] They strongly take issue with the district court's evaluation of the material facts and staunchly maintain that it failed to examine *all* of the admissible evidence, direct and circumstantial, which

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10. Specifically, plaintiffs argue first and foremost that the district court erred in holding that there is no evidence of a conspiracy under section 1 of the Sherman Act. Second, they argue that the district court erred in holding that the franchise agreement does not violate section 1 of the Sherman Act. Finally, they argue that the district court abused its discretion in dismissing the pendent state law claims.

they presented in opposition to the defendants' Rule 56 motions. The plaintiffs contend that the district court did not properly determine *what* legitimate inferences could be drawn as to the ultimate facts in issue.[11] They assail the trial court's conclusions by asking: Where are the facts?

Of course, in the true nature of our adversarial process, each side has provided us with a portrayal of the evidence which, if selectively read, could be viewed as providing a solid foundation of evidentiary support. Our function on appeal, however, in regard to summary judgment, is the same as that of a trial court: it is not within our province to adjudicate genuine factual issues. We are to view the evidence in the light most favorable to the plaintiffs, the nonmoving parties, giving Tunis Brothers, de la Riguadiere and Smith the benefit of all reasonable inferences without assessing credibility.

To determine whether the defendants have satisfied their burden under Rule 56, we must on the one hand closely scrutinize the affidavits, depositions, and exhibits submitted by the defendants, while on the other, indulgently treat those proffered by plaintiffs. 6 J. Moore, W. Taggert & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed. 1985). Only if we conclude that the evidence is so one-sided that it leaves no room for any reasonable difference of opinion as to any material fact should we hold that the case should have been decided by the district court as a matter of law rather than submitted to a jury.

Although we recognize that summary judgments are somewhat disfavored in antitrust cases, especially

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11. Even if there is no dispute as to evidentiary facts, summary judgment is inappropriate if there is a dispute as to conclusions to be drawn from the facts. Magill v. Gulf & Western Industries, 736 F.2d 976 (4th Cir. 1984).

when motive or intent is at issue, *see Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 165 (3d Cir. 1979), they are not automatically precluded in antitrust litigation, if otherwise justified. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968); *Sound Ship Building v. Bethlehem Steel Co.*, 533 F.2d 96, 99-100 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976); *Innovation Data Processing, Inc. v. International Business Machines Corp.*, 585 F. Supp. 1470, 1472 (D.N.J. 1984). Therefore, we have, with painstaking care, reviewed this massive 3,712 page record to ascertain whether it does or does not have the quantum of evidence required to sustain the district court's grant of summary judgment on behalf of the defendants as to Counts I through IV. The critical inquiry is: did the district court err in concluding that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law? *Cernuto*, 595 F.2d at 165.

We believe that, in evaluating the evidence contained in this veritable mountain of briefs and appendices, the trial judge, unintentionally of course, tilted the scale *against* plaintiffs by failing to factor into the overall conspiracy equation certain significant evidence that clearly favored the plaintiffs. Therefore, we reverse the entry of summary judgment as to Counts I, III and IV. As to Count II, we also reverse the judgment of the district court, again for the reason that evidence favoring the plaintiffs was not taken into account as to the improper use of the franchise agreement.

Our review of the dismissal of plaintiffs' pendent state claims is for an abuse of discretion. In light of our disposition of the federal claims, we reinstate Counts V and VI and remand this matter for trial.

III. ANALYSIS

A. The Antitrust Claims

For activities to constitute a section 1 violation, the following four elements must be present: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy. *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81-2 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

Although the literal language of section 1 declares "every" contract, combination or conspiracy in restraint of trade to be illegal, it has been been construed to proscribe only those combinations that "unduly" restrain trade. *Cernuto*, 595 F.2d at 166.[12] Thus, unless the particular restraint falls within a category that has been judicially determined to be illegal *per se*, the legality of a restraint challenged under section 1 of the Sherman Act must be assessed under the "rule of reason" standard.

To demonstrate an antitrust violation under the "rule of reason," plaintiffs would have to show an actual anti-competitive impact on the sale of tractors in the relevant market area. Plaintiffs allege, and may be able to prove such harmful effects, but the district court did not reach the question of adverse impact, having determined that the first element of a section 1

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12. A "rule of reason" is applied: the test of illegality is whether the restraint imposed merely regulates competition or whether it is such as may suppress or even destroy competition. Board of Trade v. United States, 246 U.S. 231, 238 (1918) (Brandeis, J.).

claim was not satisfied.[13] Plaintiffs' claims, however, are not entirely grounded on the "rule of reason;" in Count 1, plaintiffs allege the *per se* illegality of the defendants' combination in the form of a horizontal territorial restriction.[14]

1. Counts I, III, IV -- Concerted Action

We will first consider whether the defendants met their burden of establishing that, as to the undisputed material facts, there could not have been a conspiracy as a matter of law either because (a) there was not sufficient evidence of concerted action or (b) even if there was such evidence, the acts complained of are not violative of the antitrust laws.

(a) Burden of Proof

We begin with the proposition that "liability under the antitrust laws [cannot] be measured by any rigid or

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13. As stated, in addition to showing the existence of a conspiracy or combination, plaintiffs must show an adverse impact on competition to prove a section 1 claim. The termination of a dealer or rejection of a dealer application, even if done unfairly, does not by itself establish injury to competition. Industrial Investment Development Corp. v. Mitsui and Company, 671 F.2d 876, 889-90 n.16 (5th Cir. 1982), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983).

    Since the district court concluded that the plaintiffs did not satisfy the first element of a section 1 violation, it did not reach the question of whether there was an adverse impact. Thus, this issue will be remanded, along with the conspiracy issue, for further consideration and fact-finding.

14. *See* Justice Black's description of *per se* violations of the Sherman Act in Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958). Those activities requiring no proof of an actually harmful impact are horizontal and vertical price fixing, resale price maintenance, group boycotts, tying arrangements, and certain types of reciprocal dealing. *See* Cernuto, 595 F.2d at 166.

mechanical formula. . . ." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

To establish the existence of concerted action as a matter of fact, the plaintiff must submit evidence from which a jury could reasonably infer that the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective", *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1471 (1984), quoting *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), or, in other words, "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. . . ." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1243 (3d Cir. 1975).[15] Direct proof of an express agreement is not required. *Edward J. Sweeny & Sons, Inc. v. Texaco Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

As we noted in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 304 (3d Cir. 1983), *cert. granted*, 53 U.S.L.W. 3697 (U.S. April 1, 1985)(No. 83-2004), "[b]ecause the concert of action which violates the antitrust laws will so rarely be the subject of direct evidence, the Supreme Court has permitted *broad latitude* with respect to what *inferences* are permissible from the totality of the circumstances." (Emphasis added). The Supreme Court stated in *American Tobacco Co.*, 328 U.S. at 809-10:

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15. Plaintiffs assert that the district court applied too constrained a version of this test in evaluating the evidence. The district court examined plaintiffs' allegations for evidence of a "meeting of the minds" only. Tunis Bros. Co. 587 F. Supp. at 271.

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in an exchange of words. (citations omitted).

Conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. *See Associated Press v. United States*, 326 U.S. 1, 12-13 (1945). Those who, with knowledge of the conspiracy, aid or assist in carrying out the purposes of the conspiracy make themselves parties thereto and are equally liable to or guilty with the original conspirators.[16]

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16. Co-conspirators need not be intimately familiar with each and every detail of the conspiracy. A conspirator need not know all the other conspirators, nor have direct contact with them, and evidence of such knowledge is not essential. Blumenthal v. United States, 332 U.S. 539, 557 (1947); United States v. Consolidated Packaging Corp., 575 F.2d 117, 127 (7th Cir. 1978); United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944). A plaintiff "need not show that the defendant participated in every transaction or even that he knew the

The primary facts upon which plaintiffs rely to support their allegation of conspiracy are these:

(1) Plaintiffs de la Rigaudiere's and Smith's conversations and communications with defendants Ford, John Watson and Eugene W. Fraher regarding the purchase of Tunis Brothers by de la Rigaudiere and Smith and their application for Ford franchise from April 1980 to January 1981
Complaint ¶ 35-45, App. at 23-27.

(2) Plaintiffs de la Rigaudiere's and Smith's conversations and communications with defendants

Eugene W. Fraher and Hugh Nickel regarding their franchise application
Complaint ¶ 46-56, App. at 27-32.

(3) The events surrounding the rejection of plaintiffs de la Riguadiere's and Smith's franchise application
Complaint ¶ 57-65, App. at 32-35.

The character and effect of an alleged conspiracy are determined only by analyzing the activities in question as a whole. *Continental Ore Co. v. Union Carbide*, 370 U.S. at 699. This court "need not affirmatively find that a conspiracy exists, but merely that there are factual questions concerning such a conspiracy in order to deny the motions for summary judgment." *American Dermatologists' Medical Group, Inc. v. Collagen Corp.*, 595 F. Supp. 79, 81 n.1 (N.D. Ill. 1984). Therefore, we will look to the affidavits, depositions, and exhibits to determine whether the

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identities of his alleged conspirators or the precise role which they played." United States v. Kates, 508 F.2d 308, 310 (3d Cir. 1975) (footnotes omitted).

facts alleged by plaintiffs are susceptible of an interpretation that might give rise to an inference of a conspiracy.

(1) Plaintiffs' Conversations and Communications With Defendants Ford, John Watson and Eugene W. Fraher Regarding the Purchase of Tunis Brothers and Ford Franchise April 1980 to January 1981.

The district court found, as a matter of undisputed fact, that in March 1980 plaintiffs de la Rigaudiere and Smith began negotiations with Mr. and Mrs. Tunis as to the sale of the dealership. They initiated a series of meetings and negotiations with Richard and Isabelle Tunis, extending over a period of months, culminating in an Agreement of Sale dated December 16, 1980. App. at 2787.

Richard de la Rigaudiere deposed that he contacted defendant John Watson, a Zone Manager for Ford's Tractor Operations for an area including Kennett Square and Concordville, in April of 1980 regarding the proposed sale. App. at 1554. He further testified that Watson suggested that they meet at Wenner Ford and then have lunch at the Concordville Inn, near Wenner Ford. App. at 1908-11. It is undisputed that on May 23, 1980, prior to the sale of the business, de la Rigaudiere and Smith met with defendant John Watson for the purpose of discussing the transfer of the Ford franchise to them once Richard and Isabelle Tunis sold the business. The parties met at Wenner Ford.

Meeting at Wenner Ford and Concordville Inn - May 23, 1980

De la Rigaudiere testified that Watson introduced him and Smith to John S. Wenner and took them on a tour of the Wenner Ford facility. App. at 1564-5; 1910-91.

It is undisputed that the May 23, 1980 meeting also included lunch at the Concordville Inn, during which de la Rigaudiere and Smith told Watson of their plans to purchase Tunis Brothers, expand the business and become franchised tractor dealers in Kennett Square. Defendant Watson indicated that Ford did not intend to have a franchised dealership selling tractors in Kennett Square after Tunis Brothers was sold but rather was interested in having a franchised dealership in the area, 15 miles west of Kennett Square.

De la Rigaudiere and Smith both testified that Watson also said that the Kennett Square area was to belong to Wenner Ford after Mr. Tunis retired or sold the business. App. at 1567-15; 1919; 2142, 2377. Watson denies making the statement.

De la Rigaudiere further testified that Wenner was seated nearby during lunch at the Concordville Inn and was "in an excellent position to overhear . . . our conversation." App. at 1916. Defendant Wenner testified that he remembered the meeting with Watson, de la Rigaudiere and Smith at Wenner Ford but that he had no recollection of having lunch at the Concordville Inn on that same day and no recollection of ever eating at the Concordville Inn. App. at 108-10. Plaintiffs' Exhibit P-8, an invoice to Wenner Ford which shows that John Wenner had been at the Concordville Inn on May 23, app. at 2778, contradicts the testimony of Wenner. Watson denied in his deposition knowing that Wenner was at the Concordville Inn.

Following the May 23rd meeting, defendant Watson, in his Ford New Dealer Prospecting Report wrote that the two men were very well qualified to represent Ford in the trade area--Oxford and Cochranville, Pennsylvania--not Kennett Square. App. at 2779-80.

Whether or not Wenner saw Watson, de la Rigaudiere and Smith at the Concordville Inn; whether

it was just a coincidence that Wenner was seated at an adjacent table or whether this was planned and prearranged, are disputed issues of material fact properly left for a jury. [17]

Meeting on June 13, 1980 with Defendant Eugene E. Fraher

Smith testified that he and de la Rigaudiere felt that Watson and Wenner had been collaborating and decided to "go over their heads." App. at 2143. It is undisputed that later, in June 1980, plaintiffs de la Rigaudiere and Smith met with Watson's superiors, defendant Eugene E. Fraher, who was then Northeastern District Manager of Ford Tractor Operations, and his associate, Edward Poole, in Cohoes, New York.

Smith and de la Rigaudiere did not know that Fraher was also then a Director and Senior Vice President of Wenner Ford Tractor and that he had served in those official capacities since November 1979. App. at 3723, 3735, 3757, 3781, 3790, 3813, 3820, 3828, 3833-34, 3482. De la Rigaudiere testified that Fraher did not mention that Ford had a stock interest in Wenner Ford, or that he was an officer of Wenner Ford. App. at 1936-37.

It is undisputed that Fraher confirmed Watson's report that Ford intended to realign its distributorship and eliminate the Kennett Square outlet. According to Smith, Fraher agreed with Watson that Kennett Square was going to be Wenner's territory. App. at 2146. De la Rigaudiere testified to the same effect. App. at 1936.

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17. Summary judgment is inappropriate if an issue depends upon the credibility of witnesses, because credibility can best be determined only after the trier of fact observes the witnesses' demeanor. Magill v. Gulf & Western Industries, 736 F.2d 976, 979 (4th Cir. 1984).

De la Rigaudiere testified that Fraher also told them Ford preferred not to have its dealers competing with each other but went on to say that he thought de la Rigaudiere and Smith could have a dealership in Kennett Square for two to three years before they would have to move to the Cochranville area. App. at 1579-80, 1935-36, 1939-40. Smith testified, "Finally, we reached an agreement that we would start out in Kennett Square and after a period of time set up a place in Cochranville." App. at 2149. Fraher gave de la Rigaudiere and Smith dealer applications and told them to apprise him of the progress of the sale negotiations. App. at 1940.[18] After mortgage financing had been arranged through the Chester County Industrial Development Authority ("CCIDA"), App. at 2790, 3051, Richard and Isabelle Tunis and de la Rigaudiere and Smith signed an Agreement of Sale for Tunis Brothers. It is undisputed that performance of the agreement was not conditioned on de la Rigaudiere and Smith obtaining Ford's approval to continue the Tunis Brothers dealership as a Ford franchised dealership.

In January of 1981 de la Rigaudiere sent to Fraher de la Rigaudiere's and Smith's personal financial statements, a copy of the sales agreement, their

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18. By a letter dated September 29, 1980, de la Rigaudiere reported to Fraher on the progress of the purchase negotiations with the Tunis'. App. at 280. Fraher acknowledged receipt of the letter in his letter of October 15, 1980 which requested personal financial statements, the proposed agreement and the proposed plan of operation. The letter states: "[a]ny agreement you enter into should contain the stipulation the entire transaction depends on the approval of Ford. . . ." App. at 281. Plaintiff de la Rigaudiere testified that he did not think the stipulation was necessary because Fraher stated that would have the dealership in Kennett Square for two or three years. App. at 1943. In light of the assurances by Fraher, plaintiffs maintain that the stipulation was immaterial.

business plan, a description of the CCIDA and a copy of CCIDA approval. App. at 2857-58. The same package was mailed to defendant Douglas N. Crawford, who had succeeded Watson as Ford's zone manager. App. at 1666-67.

(2) Plaintiffs' Conversations and Communications With Defendant Hugh Nickel Regarding the Franchise Application

March 3, 1981 Meeting At Tunis Brothers

The district court found it to be an undisputed fact that on March 3, 1981, defendants Douglas N. Crawford and Hugh Nickel, a Dealer Replacement Representative in the Northern Region of Ford Tractor Operations, met de la Rigaudiere and Smith in Kennett Square to obtain more application information for: 1) a franchised dealership; and 2) credit from defendant Ford Credit As to this particular meeting, the district court made no further findings, nor did it consider record evidence and inferences in support of several important allegations made by plaintiffs. It is especially at this stage that the plaintiffs allege that the district court improperly tilted the scales against them by failing to note several critical facts and inferences favorable to plaintiffs that create a genuine dispute as to material facts within the admonitions of Rule 56.

De la Rigaudiere testified that he received a telephone call from defendant Crawford, who said that "Mr. Fraher was sending him." App. at 1668. Crawford testified that it was Mr. Fraher who telephoned him and told him to go to Tunis Brothers to take the dealer application. App. at 1292-94. Fraher testified that he did not call Crawford. App. at 1338-41.

During the meeting with de la Rigaudiere, Smith and Mr. and Mrs. Tunis, Nickel explained that Ford would not process an application for a replacement dealer unless the present dealer submitted a letter of

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resignation. Nickel presented Mr. Tunis with a form letter of *unconditional* resignation and termination notice for Mr. Tunis to copy and submit to Ford. *Nickel told them Tunis' resignation letter would not be finally processed until the application of the new owners for Ford franchise was approved. Nickel assured them it would be approved and that the resignation and termination letter would be kept in a drawer and not acted upon.*

Nickel also recorded considerable detailed financial information which de la Rigaudiere and Smith supplied orally. He had de la Rigaudiere and Smith sign blank applications on which the credit information was to be typed later. He stated that he would have the forms typed up in his office and then return them to de la Rigaudiere and Smith for their review before submitting them. De la Rigaudiere and Smith never saw those papers again. App. at 1954-59. *See generally* deposition testimony of de la Rigaudiere, App. at 1950-54; Smith, App. at 2158-60; Isabelle Tunis, App. at 2661-63; Richard Tunis, App. at 2556-69.

During this meeting, neither Nickel nor Crawford mentioned any move to Cochranville or Oxford or any time limit on the franchise in Kennett Square. App. at 1959-62; 2162.

Despite his assurance to de la Rigaudiere and Smith that the dealer applications would be approved, Nickel subsequently wrote a Ford New Dealer Prospecting Report which stated that he did *not* feel that de la Rigaudiere and Smith were qualified businessmen or that their net worth or financial strength was adequate to qualify for a line of credit.

(3) *Rejection of Plaintiffs' Application*

According to de la Rigaudiere and Smith, after the March 3, 1981 meeting with Nickel and Crawford, the purchase and sale of Tunis Brothers was

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consummated based on Nickel's repeated assurances that the dealership application of de la Rigaudiere and Smith would be approved. The closing of the sale of Tunis Brothers took place on March 13, 1981, and by letter dated March 17, 1981, Richard Tunis sent Ford his letter of resignation. App. at 2929. Upon receipt of Tunis' resignation, Nickel completed, by hand, a request that the Market Representation Manager accept Tunis' resignation *immediately*. App. at 2972, 1018. The request was then typed and signed by Fraher.[19] It is undisputed that defendant Kenneth E. Harris, the Market Representative Manager of the Northern Region of Ford Motor Company's Tractor Division, did not process the resignation letter, but rather, held the resignation pending a decision on plaintiffs' applications.

On April 1 1981, H. W. Stoneback, Manager of the Philadelphia Branch of Ford Credit, telephoned Harris and indicated that Ford Credit would not approve credit. Consequently, Harris called Ford to complete the resignation letter. In May 1981, de la Rigaudiere and Smith were informed that their credit application had not been approved by Ford Credit.

After de la Rigaudiere's and Smith's credit applications had been rejected, they discovered that Nickel had, in completing the dealer applications signed by them in blank, supplied information that de la Rigaudiere and Smith were investing in Tunis Brothers business only $2,500 each. Yet, they had informed Nickel at the March 3, 1981 meeting that they were putting $25,000 each into the business settlement. *See* deposition testimony of de la Rigaudiere, App. at 1959. Although Ford concedes that Nickel inserted the wrong figures, the district court

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19. Fraher signed the name of defendant E.S. Hasel, the Regional Manager, as Fraher was authorized to do. App. at 1019, 1343-44.

opinion does not address the blank applications or the erroneous information supplied. However, because the decision had been based on erroneous financial information, de la Rigaudiere and Smith were permitted to submit a new credit application to Ford Credit. App. at 3052-80.

Fraher opposed granting de la Rigaudiere and Smith a Ford dealership in Kennett Square and so advised defendant E. S. Hasel, Regional Manager of the Northern Region of Ford's Tractor Division *and* Senior Vice President and Director of Wenner Ford. Hasel notified de la Rigaudiere and Smith by letter dated August 7, 1981, that Ford would not approve their application for a franchised dealership in Kennett Square. App. at 3084. The district court does not discuss, although it acknowledges, this second rejection of de la Rigaudiere's and Smith's application. Subsequently, they became, and still are, an Allis-Chalmers dealership selling Allis-Chalmers tractors.

On the basis of the foregoing examination of the summary judgment record, we believe that there are numerous factual questions unresolved in this case. Issues of material fact need not be resolved conclusively in favor of the party opposing summary judgment; it is enough for the opposing party to show that sufficient evidence supporting some factual dispute requires a judge or jury at trial to resolve the parties' differing versions of the truth. *See Cedillo v. International Association of Bridge & Structural Iron Workers, Local Union No. 1*, 603 F.2d 7, 10-11 (7th Cir. 1979). The plaintiffs present a plausible, albeit somewhat complex and dramatic, view of the facts, but the inferences which the plaintiffs draw from the facts are not so far-fetched that a trier of fact should not be allowed to consider them. When viewed in the light most favorable to the plaintiffs, the facts are susceptible of an inference of concerted action.

However, we must still examine the *relationships* of the defendants in order to determine whether the alleged concerted conduct is violative of the antitrust laws.

(b) Liability of Co-conspirators

The character of an individual's relationship with a corporation in an intracorporate or intra-enterprise conspiracy situation is extremely significant if not determinative. Ford, Ford Credit, Wenner Ford, and John Wenner are the key corporate characters in this alleged conspiracy. The individuals who are or were employees of Ford, are denominated as "participants." The plaintiffs take the position that Ford and Wenner Ford conspired with each other and with all of the individual defendants, both employees and non-employees; that all of the individual defendants conspired with each other; and that Ford Credit conspired with Wenner Ford and with all of the individual defendants. The only change in position on appeal is that plaintiffs no longer contend that Ford conspired with Ford Credit, its wholly-owned subsidiary.[20]

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20. As we understand the alleged conspiratorial nature of the interrelationships, the breakdown is as follows:

    Ford/Ford Credit
    Ford/Individual Ford Employees
    Ford/Wenner Ford
    Wenner Ford/Ford Credit
    Wenner Ford/Individual Ford Employees
    Ford Credit/Individual Ford Employees
    Individual Defendants/Individual Defendants

    We note at the outset that plaintiffs have dispensed with their claim of conspiracy between Ford and Ford Credit. With respect to Ford/Ford Credit, the district court concluded that the facts do not justifiably permit an inference of a conspiracy between Ford Credit and Ford and thus Ford Credit could not be held liable as a co-conspirator under section 1 of the Sherman Act. Tunis Bros. Co. 587 F. Supp. at 272.

(1) Ford and Ford Employees, Including John Wenner: Wenner Ford and Wenner Ford Employees, Including John Wenner

Relying on our decision in *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981), the district court determined that individual Ford employees and John Wenner are incapable, as a matter of law, of conspiring with their respective corporations. Thus, the district court concluded that any acts between Ford and its employees or between Wenner Ford and John Wenner cannot be used to show that two or more persons or entities conspired to terminate Tunis Brothers or deny the transfer of the Ford franchise.

We do not disagree with the general proposition that officers and employees of a single firm are legally incapable of conspiring among themselves or with their firm in violation of section 1. *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984); *Tose*, 648 F.2d at 894.[21] But, this court has recently

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Even if plaintiffs established the existence of concerted action as a matter of fact, plaintiffs concede this point as a matter of law in view of the recent Supreme Court decision in Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984), in which the Supreme Court held that a parent and a wholly-owned subsidiary cannot be co-conspirators under section 1 of the Sherman Act due to complete unity of interest. Thus, the conduct is not violative of the antitrust laws. *Copperweld* does not, however, preclude a conspiratorial relationship between Ford and Wenner Ford since Wenner Ford is not wholly-owned.

21. A corporation can act only through its agents, thus the acts of corporate directors, officers and employees on behalf of the corporation are the acts of the corporation and a corporation cannot conspire with itself.

The district court noted that the rule prohibiting a conspiracy from being based on acts between a corporation and its

reaffirmed a recognized exception. If corporate officers or employees act for their own interests, and outside the interests of the corporation, they are legally capable of conspiring with their employers for purposes of section 1. *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984). *See also Johnston v. Baker*, 445 F.2d 424, 426-27 (3d Cir. 1971); *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Greenville Publishing Co. v. Daily Reflector,Inc.*, 496 F.2d 391, 399 (4th Cir. 1974).

Plaintiffs allege that defendants John S. Wenner, Eugene W. Fraher, Hugh Nickel, John Watson, Kenneth R. Harris, Douglas N. Crawford and E. S. Hasel conspired with their respective corporations and employers and fall within the exception to the general rule because each had an "independent personal stake" in achieving the allegedly illegal objective of their respective corporations and the conspiracy.[22]

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employees does not preclude a conspiracy predicated on acts by the employees and some non-employee or entity other than their own corporation. Thus, a conspiracy could be formed as to Ford and employees of Ford Credit or Wenner Ford.

Plaintiffs allege that a Ford employee, Nickel, not acting on behalf of Ford but on behalf of Wenner Ford, conspired with Ford Credit through Stonebeck. Plaintiffs rely, *inter alia*, on the telephone conversation between Stonebeck and Nickel during which they discussed the amount of capital that plaintiffs de la Rigaudiere and Smith were to invest. Therefore, we disagree with the district court's conclusion that the evidence is not sufficient to support an inference that a Ford employee, not acting on behalf of Ford, conspired with Ford Credit.

22. As to Ford and John Wenner, plaintiffs allege that John Wenner's "independent personal stake" was in achieving the elimination of Tunis Brothers as a competing Ford tractor dealer in Kennett Square through the termination of its franchise by Ford and the rejection, both by Ford and Ford Credit, of the applications for a new franchise and for wholesale credit by plaintiffs de la Rigaudiere and Smith.

As a general principle, questions of motive and intent are particularly inappropriate for summary adjudication. *Magill v. Gulf & Western Industries*, 736 F.2d 976, 979 (4th Cir. 1984) (summary judgment is seldom appropriate in cases where particular states of mind are decisive elements of claim or defense). Material fact issues exist as to the defendants' motives and because the factual issues of "personal stake" are unresolved, we hold that the district court could not properly determine, as a matter of law, whether the conduct of these employees fell within the general rule or the exception.

(2) Ford and Wenner Ford

An equally well-established tenet is that a conspiracy between corporations might arise if the directors, officers, representatives or other employees are working for two or more entities. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). Since a corporation can only act through its officers and employees, the plaintiffs assert that Wenner Ford conspired with Ford through defendants Fraher and Hasel who were Senior Vice Presidents and Directors of Wenner Ford at various times while they were acting as management employees of Ford.

They allege an economic motivation given the fact that Wenner owned all of the common stock in Wenner Ford, representing 21% of its equity stock. The same rationale would apply to Wenner Ford and John Wenner.

As to Ford and the other individual Ford employees, plaintiffs allege that their personal motivation and stake was not monetary gain but the product of loyalty and allegience to John Wenner, a former Parts Operations Manager of Ford's Tractor Operations in Michigan before he acquired the privately-capitalized Ford franchise in which defendants Watson, Nickel and Fraher were closely involved when Wenner experienced a major financial crisis. The same motive is suggested as to Wenner Ford and individual Wenner Ford employees, Fraher and Hasel.)

The district court acknowledged that Fraher and Hasel served simultaneously as directors and officers of Ford and Wenner Ford. The court nonetheless determined that there were no facts which indicated that Fraher and Hasel, while working on behalf of Wenner Ford, attempted to terminate Tunis Brothers or prevent the transfer of the Ford franchise to de la Rigaudiere and Smith. We disagree. We believe that the plaintiffs have submitted evidence which could lead a jury to believe that the decision to terminate was *not* made *unilaterally* on the part of Ford.[23] We begin with the well-established rule that "a manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Service Corp.*, ___ U.S. ___, 104 S. Ct. 1464, 1469 (1984). A *unilateral* refusal to deal does not constitute an illegal contract, combination or conspiracy within the meaning of section 1 of the Sherman Act. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). The Supreme Court in *Monsanto* recognized that there is, however, a crucial difference between accepted supplier actions such as pursuing market strategies, whereby a supplier seeks to compete with other manufacturers by imposing "reasonable" vertical restraints, and those actions of a supplier taken at the direction of its distributor. In the latter situation, the

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23. Defendants analyze the instant case as a *vertical restraint*, and stress that Ford's conduct was a lawful, unilateral decision.

    The usual vertical restraint occurs due to vertical conflict -- conflict between the manufacturer's goals of improvement of its product or service's competitiveness and the subgoals of the distributor, such as individual profit maximization and independence. There is a *horizontal* conflict present in this case as well, however, between the subgoals of the two distributors, Wenner Ford and Tunis Brothers. We cannot ignore this obvious fact and its implications.

restraint becomes primarily horizontal in nature in that one distributor is seeking to suppress its competition by utilizing the power of a common supplier. "[T]he termination in such a situation is, itself, a vertical restraint[;] the desired impact is horizontal and on the dealer, not the manufacturer, level." *Cernuto*, 595 F.2d at 168. [24]

The tricky problem, of course, is that the case at bar is more akin to the latter situation -- it is neither a pure vertical refusal to deal nor a pure horizontal refusal to deal. The so-called "dealer complaint" cases involve a similar type of hybrid configuration and

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24. In those situations where the termination of a distributor has allegedly occurred due to a conspiracy between the supplier and one or more of its distributors, the courts have been uncertain as to whether to apply the "rule of reason" or the *per se* rule because, such cases have *both* horizontal and vertical elements.

    If purely a horizontal restraint, it would be subject to scrutiny under the Sherman Act as illegal *per se*, *see, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966)(concerted refusal to deal), whereas if truly vertical, it could only be subject to the "rule of reason." *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

    The dilemma has been described as follows:

    > The actual termination of the distributor is imposed vertically by the supplier, yet the inducement for the termination may come horizontally from the complaining competitors of the terminated distributor. Thus, although the form of such a "mixed termination" conspiracy may be vertical, the competitive purpose and effect of the conspiracy is more similar to horizontal conspiracies that exclude competitors of the conspirators from a market.

    Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297, 298 (1982). (footnote omitted)

provide the appropriate analytical analogy. These dealers usually allege that a refusal to deal, often manifested by their termination, was illegal because it was effectuated pursuant to an agreement among their supplier and one or more other distributors seeking to avoid competition with the terminated distributor. As evidence of such an illegal agreement, the distributor may cite other distributors' complaints to the supplier about the distributor's price-cutting, territorial incursion or other agressive competition.

The defendants seek to distinguish this action from these "mixed termination" or "dual distribution" cases by claiming that this matter does not rise to the level of a typical "dealer complaint" case because there is no evidence of any *complaints* to Ford by John Wenner or Wenner Ford. *See, e.g., Merican, Inc., v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1278 (1984); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467 (10th Cir. 1985); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 105 S. Ct. 432-33 (1984). Nonetheless, we believe that this case could fall within the ambit of the dealer termination cases -- although granted it is not typical -- because the key element is not the complaint but simply probative evidence of some form of collusion between a supplier and a competiting distributor which interjects horizontal conflict.

In *Fragale & Sons Beverage Co. v. Dill*, Nos. 84-5614 and 84-5616 (3d Cir. April 15, 1985), we recently addressed the evidentiary burden an antitrust plaintiff in a refusal to deal situation must bear on summary judgment. Relying on *Monsanto*, a dealer termination case wherein the Supreme Court determined that in order to submit a section 1 claim to the jury, more than evidence of complaints from other distributors is needed, and also relying on our own

decision in *Sweeney*, we held that as part of the burden of establishing concerted action, the plaintiff must produce evidence that "tends to exclude the possibility that the [defendants] were acting independently." As we read *Fragale* and the authorities upon which it relies, the *initial* burden is not upon the plaintiff to *disprove* the likelihood of independent action, as the dissent suggests: the defendant must first prove the non-existence of a genuine issue of material fact. In this vein, we are also guided by Judge Wallace's cogent analysis in *Barnes v. Arden Mayfair, Inc.*, No. 84-3621 (9th Cir. April 15, 1985):

> We see no reason [not to] permit a defendant to meet its burden [of proving the non-existence of a material fact] by showing legitimate business reasons for its conduct. Once a defendant adequately explains its conduct, it is not unreasonable to require a plaintiff to put forth significant probative evidence, that is, evidence which is capable of sustaining an inference "that tends to exclude the possibility that the [defendant was] acting independently" and thus lawfully. (citations omitted).

Therefore, our inquiry is whether plaintiffs' allegations of conspiracy have been rebutted by probative evidence supporting an alternative interpretation of the defendants' conduct. If there is substantial factual evidence supporting *both* an inference of conspiracy *and* an inference of lawful conduct, and the crucial question involves motive, summary judgment is inappropriate. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968) (emphasis added); *see also Tose* 648 F.2d at 894-95 (evidence of motive must be weighed against business justifications put forth since court

must draw line between reasonable inferences for jury's consideration and "impermissible speculation.")

The plaintiffs make a compelling argument that Wenner Ford conspired with Ford through defendants Fraher and Hasel. They assert that the decision to terminate Tunis Brothers and the rejection of de la Rigaudiere's and Smith's applications for a new franchise and for wholesale credit was the result of *pressure from another franchisee*, Wenner Ford, as exerted by and through defendants Hasel and Fraher who were officers and directors of Wenner Ford.[25] The plaintiffs maintain that they have direct evidence that Hasel and Fraher made the decision for Ford to reject de la Rigaudiere's and Smith's application and to terminate Tunis Brothers. They rely on the following factors:

- In March 1981, Fraher first sent Nickel and Crawford to Tunis Brothers to secure an unconditional resignation from Mr. Tunis which Nickel told de la Rigaudiere and Smith would not be made effective until their dealership applications were approved.
- Without waiting for approval, Fraher immediately processed the resignation so that it became effective and Tunis Brothers was terminated on April 2, 1981.
- In March 1981 Fraher submitted de la Rigaudiere's and Smith's application to Ford Credit with inaccurate financial information which Nickel later verified to Ford Credit.
- After de la Rigaudiere and Smith discovered the inaccurate information on the application forms

25. Whether Hasel and Fraher were "nominal" officers of Wenner Ford is a question of disputed fact. The power to vote is the power to destroy.

they signed in blank, and after they submitted *new* applications in July 1981 with accurate information, Fraher persuaded Hasel, who was then Senior Vice President of Wenner Ford as well as Regional Manager of Ford, to reject the application.

Was Nickel's understatement by 90 percent ($22,750) as to the amount of cash that de la Rigaudiere and Smith invested merely an inadvertent error, or was it an advertent effort to, in combination with Wenner and others, elminate Tunis Brothers as a competitor to Wenner Ford?

The difference between a reported $2,500 and the actual $25,000 cash downpayment has to be significant in the credit application and hence the dealership application. Was Nickel's misstatement that the credit application would be approved merely an optimistic forecast or was it part of a venal plan, in combination with Wenner Ford and others, to lull Tunis Brothers into prematurely terminating the franchise? Certainly the ultimate answer is one that should be given by the trier of facts and not decided in a summary judgment ruling.

In our view, this raises a disputed issue of material fact as to motive, intent and conflict of interest. Viewing the evidence in the light most favorable to the plaintiffs, we find that the evidence presented supports an inference that the close ties between defendants Hasel and Fraher and defendants Ford and Wenner Ford led to an illegal agreement, even if implicit. It is reasonable to infer that Fraher and Hasel were mindful of their corporate obligations as officers and directors of Wenner Ford when they considered the matter of Tunis Brothers in 1980 and 1981. Fraher and Hasel served "two masters" -- one Wenner Ford, the other Ford Motor Company. There is no reason why a jury must find that they made some of their Ford decisions

adverse to plaintiffs with an obliviousness to its advantages to Wenner Ford. He who wears two hats simultaneously should not be surprised if a jury wonders which hat he prefers. He should not be surprised if the jury concludes, by his actions, that he favors only one of the hats -- the one from the "Wenner Ford Haberdashery", for instance.

Defendants argue that even in "dealer complaint" cases, terminations and restrictions are entirely lawful so long as the manufacturer's actions of control over distributors were consistent with *market strategy* and there is no evidence that the manufacturer acted contrary to its market strategy for the benefit of its distributors or dealers. According to Ford, its marketing plans as early as the mid - 1970's contemplated the termination of the Kennett Square site as soon as Mr. Tunis retired or resigned. Ford also asserts that its decision on plaintiffs' application was guided by its perception of plaintiffs' financial soundness. From our reading of the record, however, this articulated business justification raises disputed issues of fact.[26] Furthermore, we cannot reconcile this

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26. The dissent refers to the "undisputed testimony" that Ford planned to combine Rising Sun, Maryland and Kennett Square, Pennsylvania dealerships into one dealership in either Oxford or Cochranville. Defendant Watson testified: "I just can't answer whether [the decision] was before 1974 or after or when it was made, but it had been made." App. at 490. The dissent refers to the "undisputed testimony" that Ford representatives informed the plaintiffs of this market strategy. Mr. Tunis testified that Watson "gave me every indication that as long as the new owners were financially responsible that there wouldn't be any problem about the transfer of the dealership to the new owners." App. at 2517. In response to counsel's question as to whether or not a Ford representative spoke to him about whether Ford was interested or not interested in continuing a dealership at Kennett Square, Mr. Tunis replied:

"plausible explanation" with the conduct of the defendants that fell short of "proper business practices." *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 672 (3d Cir. 1980). Are we to assume that the allegedly falsified credit applications of de la Riguadiere and Smith and the allegedly fraudulent inducement of Mr. Tunis to submit an unconditional resignation is conduct consistent with the implementation of a legitimate business purpose?

Also in support of their market strategy argument, the defendants rely on *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1199 (6th Cir. 1982), *cert. denied*, 104 S. Ct. 1718 (1984), *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1707 (1984) and *Battle v. Watson*, 712 F.2d 1238 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1718-19 (1984). We believe these cases are distinguishable.

At the outset, we note that in these "dealer complaint" cases, the complaining dealer was not a Dealer Development Company where the franchisor owned all of the voting stock and 79% of the equity stock. Thus, the franchisor itself in this case has a horizontal interest. Moreover, in the cases relied on by the defendants, the courts found no proof that dealer complaints were *causally related* to the manufacturer's decision to terminate.

A. He never said anything about that.

Q. He never said one way or the other?

A. Never said one way or the other. It was never discussed.

. . .

Q. Did you ever discuss retirement without selling your business?

A. Never.

App. at 2518-19.

In *Davis-Watkins*, the exclusive distributor of microwave ovens brought an action against the retail merchandising firm and the court held that there was insufficient evidence that concerted action existed to support the general rule that non-price vertical restraints should be analyzed under the "rule of reason." The court stated that in determining whether non-price restraints are imposed vertically or horizontally, the focus of the inquiry must be on the *purpose and effect* of such restrictions. The court found no evidence that any of the distributors or dealers, by concerted action among themselves or by Amana, the supplier, refused to deal with the plaintiff. The court found no evidence that established that dealer coercion caused Amana to act other than consistently with its market strategy. The crux of the case was that the distributor had failed to submit evidence that Amana and the distributors had acted jointly. The evidence tendered consisted of complaints to Amana by its distributors and dealers concerning low prices and lack of service. It in no way established "unity of purpose or common design among distributors and dealers on a horizontal level." *Davis-Watkins*, 686 F.2d at 1199.

The *Davis-Watkins* court thus found that the distributor was attempting to enter Amana's distribution chain on a basis consistent with *its own marketing strategy* rather than the marketing strategy that Amana imposed upon its distributors and dealers. The court therefore determined that the manufacturer imposed restrictions based on its own independent business judgment.

In the present case, an inference of unity of purpose or common design arises initially from the fact that Fraher and Hasel were simultaneously acting on behalf of Wenner Ford, a competing dealer, and Ford, the franchisor.

Battle and *Roesch*, also relied upon by the defendants, present a situation similar to that posed in *Davis-Watkins*. However, the summary judgment of the district court in each instance was affirmed by an equally divided court sitting en banc, and thus, while instructive, these cases are lacking in precedential value. In any event, the two are distinguishable from this one. Both involved the case of a competing distributor which complained to the manufacturer but received a neutral response; later, the manufacturer made a unilateral decision to terminate the plaintiffs. In both cases, the court concluded that a manufacturer's termination after receiving complaints cannot be characterized *in and of itself* as responsive action permitting an inference of concerted action. *Battle*, 712 F.2d at 1240.

In all three of the above cases, the courts refused to infer concerted action from isolated dealer complaints in keeping with *Monsanto's* directive. However, the distinguishing feature of this case is that it does not involve isolated complaints but rather, two directors and officers of a competing dealer who are also management officials of the franchisor. In none of the cases relied upon by the defendants has there been this complicity of interrelationship between the franchisor and a franchisee competing with the plaintiff.

As to Ford's marketing strategy, we point to Judge Adams' reasoning in *Cernuto*, 595 F.2d at 168:

> "When a marketing decision, although ostensibly taken by a manufacturer, is in fact the result of pressure from another customer, such a decision must be scrutinized more closely than solely unilateral action might be."

The import is clear: Once the manufacturer's refusal to deal is tainted with *duality of action*, as manifested by some "agreement", the *Colgate* defense of unilateral action is not applicable.

2. Count II -- Illegal Contract

We now turn to the question of whether the defendants met their burden of establishing that, as to the undisputed material facts, there could not have been a contract in restraint or trade because (a) the agreement was valid on its face and (b) there was not sufficient evidence that the agreement was used to further an illegal objective.

The district court held that the 1974 franchise agreement for the dealership did not, *on its face*, violate section 1 of the Sherman Act. We agree.

Count II alleges that the 1974 franchise agreement between Ford and Tunis Brothers constituted a contract in unreasonable restraint of trade. The purportedly unlawful provisions in the franchise agreement are 1) that the franchisee, Tunis Brothers, could not transfer the franchise without the franchisor Ford's approval; 2) Ford had the right to terminate the agreement without notice if there was a transfer or attempt to transfer any ownership interest in the dealership; and 3) Ford had the right to deny an application for a Ford franchise from any purchaser of the Tunis Brothers business.[27] According to plaintiffs, these contractual provisions made the agreement illegal both *per se* and under a "rule of reason" analysis.

We are inclined to accept the district court's reasoning as to the *per se* illegality of the clauses: a manufacturer is free to choose with whom he will deal absent any agreement restraining trade, *Colgate*, 250 U.S. 300; *Cernuto*, 595 F.2d 164, and a refusal to deal is not a violation unless it is the result of collusive action between two entities. In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967), the

27. The plaintiffs challenge ¶ E, ¶ 14(b)(1), ¶ 15, and ¶ 14(e) of the franchise agreement.

Supreme Court discussed the permissible limits of franchisor control of franchisees:

> . . . if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.

A district court opinion lends support:

> [T]here is certainly nothing unreasonable in requiring the consent of the franchisor to the assignment of the franchise. A franchisor has a perfect right to consider the character, stability, reputation, business ability, etc., of those to whom it will entrust its own goodname, its mark and its products. We see nothing invidious in a franchisor taking precautions against the indiscriminate use of its own reputation and the intrusion of perhaps unsavory strangers.

Seligson v. Plum Tree, Inc., 361 F. Supp. 748, 753 (E.D. Pa. 1973).

However, Count II also avers that Ford used the contractual provisions to reject plaintiffs de la Rigaudiere's and Smith's application to be franchised Ford dealers and to prevent a transfer of the Ford franchise and further avers that all of the named defendants aided and abetted Ford in exercising its rights under these provisions in furtherance of these illegal objectives. Complaint ¶ 94, 95; App. at 47, 48.

The district court determined that there are *no facts* which show that Ford improperly used the franchise agreement to deny transfer of the franchise to de la Rigaudiere and Smith.

We disagree. The plaintiffs suggest that Ford did more than simply assert its rights under the terms of

the clauses. They assert an unlawful use of the agreement -- the objects of, and the conduct engaged in pursuant to that contract were illegal. Their precise contention is as follows: "[the] franchise agreement and the acts, representations, statements and conduct and conspiracy of the defendants . . . [were] in furtherance of defendants' illegal antitrust objectives . . ." App. at 1068.

Under the "rule of reason" standard, there is a greater reluctance to uphold a grant of summary judgment where the conduct is to be examined for its reasonableness than where it is to be subjected to a *per se* rule. *See Harold Friedman, Inc. v. Thorofare Markets*, 587 F.2d 127 (3d Cir. 1978). While we do not accept the plaintiffs' urging to subject the provisons of the franchise agreement to a *per se* rule, we do agree that the reasonableness of Ford's alleged anticompetitive conduct can be determined only after the evidence adduced at trial is assessed. We reiterate: disputed issues of material fact as to motive, intent and conflict of interest permeate this record.

B. The Pendent Claims

1. Counts V and VI -- Tort and Breach of Contract

In view of the foregoing, we find that the entry of summary judgment on the federal antitrust claims was improper and therefore, the district court abused its discretion in dismissing plaintiffs' state common law breach of contract and tort claims.

IV.

Accordingly, the judgment of the district court will be reversed as to Counts I, II, III and IV. Counts V and VI will be reinstated and this case remanded for trial on all counts.

HUNTER, *Circuit Judge*, dissenting:

1. My disagreement with the majority opinion lies not with what the opinion recites, but with what the opinion omits. Because I believe that appellants have utterly failed to raise genuine issues of material fact to support a conspiracy in violation of section 1 of the Sherman Act, I respectfully dissent.

2. The majority opinion states, and I agree, that: "[t]o establish the existence of concerted action as a matter of fact, the plaintiff must submit evidence from which a jury could reasonably infer that the defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective . . . ." Maj. op. typescript at 15. The majority opinion fails, however, to complete its paraphrase of this court's opinion in *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 110-11 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), and the Supreme Court's opinion in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984). Because this omission is critical to this case, the majority erred when it failed to complete the statement of the appellants' burden.

3. In *Monsanto*, the Court held that an antitrust plaintiff in a refusal to deal case must establish, either by direct or circumstantial evidence, that the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective." 104 S. Ct. at 1471. As part of this burden, however, the Court stated that the antitrust plaintiff must produce evidence that "tends to exclude the possibility that the [defendants] were acting independently." *Id.*; *see Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). In this regard, "[e]vidence of an opportunity to conspire, although relevant, is not enough to sustain an antitrust plaintiff's burden, and,

without more, does not create a jury question on the issue of concerted action." *Fragale & Sons Beverage Co. v. Dill*, Nos. 84-5615, 84-5616 (3d Cir. April 15, 1985).

4. By ignoring the necessity of disproving the likelihood of independent activity, the majority opinion allows appellants in this case to sidestep summary judgment on the basis of evidence, which, even if believed, would only establish that an opportunity to conspire existed. For example, the majority correctly finds that the only possible section 1 conspiracy claim in this case involved alleged concerted action between Ford Motor Company and those Ford employees who also served as nominal directors of Wenner Ford. The facts recited by the majority to support this allegation of conspiracy, however, establish at the very most only that defendants were in a position to conspire.[1] Further, by not focusing on the possibility of independent action by Ford Motor Company in denying appellants their desired tractor franchise, the majority misses the critical teaching of both *Monsanto* and *Sweeney*: "A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." 104 S. Ct. at 1469; *see Sweeney*, 637 F.2d at 110-11.

5. When the necessity that appellants must disprove the possibility of independent action is put into the case, as we submit it must, the undisputed facts are dispositive. These facts fully support Ford's

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1. The majority, for example, cites the following "material" facts: that Ford representatives met with appellants at Wenner Ford's dealership; that the meeting continued over lunch at the Concordville Inn; that defendant Wenner possibly overheard the meeting participants' conversation at lunch; and that the Ford Representatives told appellants that Ford did not want a tractor dealership in the locale that appellants desired. Maj. op., typescript at 19-20.

contention that it acted independently in denying appellants the tractor franchise in Kennett Square, Pennsylvania, and include: undisputed testimony that Ford, as part of a market strategy developed before Wenner Ford even existed, planned to combine its Rising Sun, Maryland and Kennett Square, Pennsylvania dealerships into one dealership in either Oxford or Cochranville, Pennsylvania (App. at 490-93, 2517-18); undisputed testimony that Ford representatives informed both the franchisee who sold to appellants and appellants themselves of this marketing strategy (App. at 491-92, 2517-18); undisputed evidence that Tunis Brothers had poor sales in recent years (App. at 503), and in fact averaged only nine tractors sold per year between 1978-80 (App. at 556); undisputed evidence that a declining market for tractors existed in the Kennett Square area (App. at 342-43, 361, 364); and, perhaps most importantly, undisputed evidence that appellants, although given an opportunity by Ford to obtain a franchise in Cochranville, never applied for the franchise (App. at 293-94, 1337).

6. I do not doubt that appellants are disappointed in Ford's decision not to award them a franchise in Kennett Square. Disappointment over a unilateral decision not to deal, however, does not provide a claim for relief under the Sherman Act. I would affirm the district court's order.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TUNIS BROTHERS COMPANY, INC., RICHARD N. de la RIGAUDIERE, and DAVID C. SMITH	:	CIVIL ACTION
v.	:	
FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY, WENNER FORD TRACTOR, INC., JOHN S. WENNER, JOHN WATSON, DOUGLAS N. CRAWFORD, EUGENE W. FRAHER, E. S. HASEL, HUGH NICKEL, and KENNETH E. HARRIS	:	NO. 82-5557

MEMORANDUM AND ORDER

BECHTLE, J. MAY 7, 1984

This action involves federal antitrust claims and pendent state law claims. Presently before the court are defendants' two motions for summary judgment.[1] For the reasons stated herein, the motions for summary judgment will be granted on the antitrust claims and the remaining state law claims will be dismissed without prejudice.

I. FACTS

In order that there be a better understanding of this case, a brief review of the facts and relationships of the parties is necessary. In 1959, plaintiff Tunis Brothers Company, Inc. ("Tunis Brothers"), located in Kennett Square, Pennsylvania, became a Ford Motor Company

1. One of the two motions for summary judgment has been filed by all defendants except Wenner Ford Tractor, Inc. and John S. Wenner. The other motion for summary judgment has been filed by defendants Wenner Ford Tractor, Inc. and John S. Wenner.

("Ford") franchised dealership selling tractors.[2] The dealership was owned and operated by Richard and Isabelle Tunis.[3] In March 1980, Richard Tunis was approached by plaintiffs Richard N. de la Rigaudiere ("de la Rigaudiere") and David C. Smith ("Smith") in their attempt to buy the business. Eventually, sometime in late 1980, Richard and Isabelle Tunis agreed to sell the business to de la Rigaudiere and Smith.

In May 1980, prior to the sale of the business, de la Rigaudiere and Smith met with defendant John Watson ("Watson"), a zone manager for Ford, for the purpose of discussing the transfer of the Ford franchise to them once Richard and Isabelle Tunis sold the business. The parties met at Wenner Ford Tractor, Inc. ("Wenner Ford"). Wenner Ford is the Ford tractor dealership nearest to Tunis Brothers and has as its president and chief executive, defendant John S. Wenner ("Wenner").[4] During the meeting, which included lunch at the Concordville Inn, Watson indicated that Ford did not intend to have a franchised dealership selling tractors in Kennett Square after Tunis Brothers was sold but rather,

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2. In addition to selling Ford tractors, Tunis Brothers sold Ford accessories and non-Ford products. For the period of time from 1977 to 1981, Tunis Brothers' sales of Ford products as compared with its total sales ranged from a high of 65.8% in 1979 to a low of 46.2% in 1981. *See* Plaintiffs' Amended Answers to Defendant Ford Motor Company's Interrogatories; Plaintiffs' Trial Exhibit P-102.

3. A 1974 franchise agreement between Ford and Richard and Isabelle Tunis remained in effect, without interruption, and governed the parties' relationship after 1974.

4. Wenner Ford is a participant in Ford's Dealer Development program. This program permits Ford and another party to invest in a dealership with the understanding that the other party will buy out Ford's investment within a reasonable time and thus become a privately capitalized dealer. The terms of the Dealer Development Agreement in this case included, *inter alia*, that Ford would be the sole preferred stock shareholder of Wenner Ford and that John Wenner would be the sole common stock shareholder. Only the preferred shares are capable of being voted under terms of the Agreement. *See* Plaintiffs' Trial Exhibits P-163, 164.

was interested in having a franchised dealership in the Cochranville/Oxford area 15 miles west of Kennett Square.

Later, in June 1980, plaintiffs de la Rigaudiere and Smith met with Watson's supervisors, defendant Eugene W. Fraher ("Fraher") and his associate, Edward Poole, in Cohoes, New York. At that time Fraher was District Manager for the Northeastern District of Ford Tractor Division. At the meeting Fraher confirmed what plaintiffs had been told regarding Ford's plan to eliminate its Kennett Square franchise once Tunis Brothers was sold. Despite this, plaintiffs were asked to submit financial information and a business plan containing their proposals for operating a franchised dealership.

On December 16, 1980, Richard and Isabelle Tunis and de la Rigaudiere and Smith signed an Agreement of Sale for Tunis Brothers. Performance of the agreement was not conditioned on plaintiffs obtaining Ford's approval to continue the Tunis Brothers dealership as a Ford franchised dealership. In early 1981 plaintiffs sent to Ford the plan requested by Fraher during the June 1980 meeting. On March 3, 1981, defendants Hugh Nickel ("Nickel") and Douglas N. Crawford ("Crawford"), both employees of Ford, met with de la Rigaudiere and Smith in Kennett Square to obtain more application information for: 1) a franchised dealership; and 2) credit from defendant Ford Motor Credit Company ("Ford Credit").

The closing of the sale of Tunis Brothers took place on March 13, 1981. By letter dated March 17, 1981, Richard Tunis sent Ford his letter of resignation. Defendant Kenneth E. Harris ("Harris"), Market Representative Manager of the Northern Region of Ford Motor Company's Tractor Division, did not process the resignation letter, but rather, held the resignation pending a decision on plaintiffs' applications.

In May 1981, de la Rigaudiere and Smith were informed that their credit application had not been approved by Ford Credit. However, since the decision had been based on erroneous financial information, plaintiffs were permitted to submit a new credit application to Ford Credit. By letter dated August 7, 1981, defendant E. S. Hasel ("Hasel"), Regional Manager of the Northern Region of Ford Motor Company's Tractor Division, advised de la Rigaudiere and Smith that Ford would not approve their application for a franchised dealership in Kennett Square. Subsequently, plaintiffs became, and still are, an Allis-Chalmers dealership selling Allis-Chalmers tractors at Tunis Brothers.

On December 2, 1982, plaintiffs Tunis Brothers, de la Rigaudiere and Smith filed a complaint in this court. The plaintiffs' claims, as discussed below, are based on section 1 of the Sherman Act and state law.

Counts I through IV are based on the federal antitrust laws. More specifically, Counts I, III and IV are based on an alleged conspiracy under section 1 of the Sherman Act. In these counts plaintiffs allege that all the defendants conspired for the purposes of terminating Tunis Brothers as a Ford franchised dealership and preventing plaintiffs de la Rigaudiere and Smith, as new owners of Tunis Brothers, from operating their dealership as a Ford franchised dealership (hereinafter referred to as the "conspiracy").[5] The conspiracy, plaintiffs

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5. A fair reading of Counts I, III and IV reveals the following distinctions among these counts. Count I sets forth a *per se* violation of section 1 of the Sherman Act and is based on the alleged conspiratorial conduct of defendants. Count III of the complaint is the same as Count I except for the additional allegation that defendants' conspiracy included "dirty business tricks and unfair business dealings." Count IV is the same as Count I with the exception that in Count IV plaintiffs do not allege a *per se* violation of section 1 of the Sherman Act but rather, allege that defendants' conspiratorial conduct violated the rule of reason.

claim, was formed with the intent to eliminate or substantially decrease competition with defendant Wenner Ford.

Count II is also based on section 1 of the Sherman Act. In this count, however, plaintiffs do not allege the existence of a conspiracy but rather contend that a 1974 franchise agreement between Ford and Tunis Brothers which governed the parties' relationship after 1974 was a contract in unreasonable restraint of trade or commerce.

Count V and VI are state law claims over which this court has pendent jurisdiction. In Count V plaintiffs allege a number of different theories upon which they claim defendants are liable. As plaintiffs have stated, Count V of the complaint is "based upon fraud and other tortious conduct."[6] Count VI is a contract claim in which plaintiffs allege that Ford breached the franchise agreement and that all the other defendants aided or abetted Ford in breaching the franchise agreement.

II. SUMMARY JUDGMENT

In ruling on defendants' motions for summary judgment, this court is aware that summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56. Additionally, this court is aware that due to the complexity of many antitrust cases summary judgment is used sparingly in such cases. *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Nevertheless, summary judgment, if otherwise justified, is clearly appropriate in antitrust cases. *See International Salt Co. v. United States*, 332 U.S. 392 (1947).

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6. Plaintiffs' response to defendants' motions for summary judgment p. 13; Transcript of February 8, 1984 hearing on motions for summary judgment, Tr. 45-46.

A) Counts I, III and IV

Counts I, III and IV of the complaint are based on alleged violations of section 1 of the Sherman Act. The basic principles which guide this court in determining whether a violation of section 1 of the Sherman Act has occurred have been articulated by the Third Circuit Court of Appeals.

> In order to sustain a cause of action under §1 of the Sherman Act, the plaintiff must prove: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.
>
> Unless the particular restraint falls within a category that has been judicially determined to be illegal per se, the legality of a restraint challenged under §1 of the Sherman Act must be assessed under the rule of reason. Under the rule of reason standard, only those restraints upon interstate commerce which are unreasonable are proscribed by §1 of the Sherman Act.

Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81-82 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (citations omitted).

Since Counts I, III and IV are all premised on the existence of a conspiracy, despite any differences among these counts,[7] in order to succeed on any of these three counts plaintiffs must show that a conspiracy within the meaning of section 1 occurred.

In determining whether plaintiffs have satisfied the burden of producing sufficient evidence of a section 1

7. *See* note 5 *supra*.

conspiracy, it is not required that plaintiffs present direct proof of the conspiracy. On the contrary, plaintiffs may rely on inferences drawn from circumstantial evidence. *See Edward J. Sweeny & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980). The latitude with respect to what inferences are permissible from the circumstances is broad, *see, e.g. Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 223-28 (1939), but not limitless. There are limits beyond which reasonable inference-drawing degenerates into groundless speculation. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 304 (3d Cir. 1983). Additionally, in examining the proposed evidence of an antitrust conspiracy, courts have been warned against fragmentizing or compartmentalizing the evidence. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-699 (1962); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1253 (3d Cir. 1975). With these guidelines in mind, the court examines plaintiffs' allegations of a conspiracy to determine if there is evidence of a "meeting of the minds," *see American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946), and if so, to whom the minds belong.

The defendants who allegedly conspired are Ford, Ford Credit, John Wenner, Wenner Ford, and a number of individuals who are or were employees of Ford.[8] At the outset it should be noted that both John Wenner and the individual Ford employees are incapable of conspiring with their respective corporations and that the Ford employees are incapable of conspiring among themselves to the extent they are acting on Ford's behalf. *See, e.g., Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir.

8. By Order dated June 22, 1983, this court dismissed all claims against another named defendant, C.W. Wenzel, for lack of personal jurisdiction. *Tunis Brothers Co., Inc. v. Ford Motor Co.*, No. 82-5557 (E.D. Pa. June 22, 1983).

1952), *cert. denied*, 345 U.S. 925 (1953); II E. Kintner *Federal Antitrust Law* §9.8 (1980). Thus, any acts between Ford and its employees or between John Wenner and Wenner Ford cannot be used to show that two or more persons or entities conspired, within the meaning of section 1 of the Sherman Act, to terminate Tunis Brothers or deny the transfer of the Ford franchise to de la Rigaudiere and Smith.[9]

(i) Ford Credit

There is no evidence whatsoever from which this court could infer that Ford Credit conspired with John Wenner or Wenner Ford. Therefore, in their attempt to show that Ford Credit was a party to the overall conspiracy plaintiffs attempt to show a conspiracy between Ford and Ford Credit. They attempt to do so by producing evidence of a conversation between defendant Nickel, a Ford employee, and Howard Stonebeck, Branch Manager of Ford Credit's Philadelphia branch office.[10]

The evidence of the conversation is a written entry in a chronology of events covering the first credit application submitted to Ford Credit. The relevant entry refers to a phone conversation between Stonebeck and Nickel during which they discussed certain financial information on plaintiffs' application, specifically, the amount of capital de la Rigaudiere and Smith were intending to invest in the dealership. The entry indicates that as a result of the conversation Stonebeck had the impression that

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9. This rule prohibiting a conspiracy from being based on acts between a corporation and its employees does not, of course, preclude a conspiracy predicated on acts by the employees and some non-employee or entity other than their own corporation. Thus, for example, it is possible that a conspiracy could be formed between John Wenner and a Ford employee.

10. Plaintiffs contend that this conversation is their principal evidence of Ford Credit's conspiratorial behavior (Tr. 49). The court determines that this is the only evidence which purportedly shows Ford Credit's participation in the alleged conspiracy.

Ford did not want the application approved.[11]

While such evidence may be probative of Ford's intention to deny the franchise application of plaintiffs, it is not probative of Ford Credit's participation in any type of agreement. Neither this evidence, the fact that Ford Credit did not approve plaintiffs' first credit application,[12] nor any permissible inference which could be drawn from this evidence, warrants a finding that Ford Credit and Ford "had a unity of purpose or a common design and understanding. . . ." *See Coleman Motor Co. v. Chrysler Corp.*, 525 F 2d 1338, 1345 (3d Cir. 1975) (citations omitted).

Since there is no evidence that Ford Credit conspired with either John Wenner or Wenner Ford and since this court has determined that the facts do not justifiably permit an inference of a conspiracy between Ford Credit and Ford,[13] Ford Credit cannot be liable as a co-conspirator under section 1 of the Sherman Act.

(ii) John Wenner

Plaintiffs claim that John Wenner was a member of the conspiracy "from the very beginning . . . through a tacit agreement."[14] However, the evidence plaintiffs rely upon in opposing defendants' motions for summary judgment, taken as a whole, fails to show that John

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11. Saxton Deposition, pp. 23-24; Plaintiffs' Trial Exhibit P-73.

12. Although the first credit application submitted by de la Rigaudiere and Smith was denied, plaintiffs were permitted to submit a second application when it was determined that the first credit application had contained erroneous financial information. This second credit application was still pending with Ford Credit when Ford, through defendant Hasel, notified de la Rigaudiere and Smith that they would not be given a Ford tractor franchise in Kennett Square.

13. The court also finds that there is no evidence which would support a finding that a Ford employee, but not acting on behalf of Ford, conspired with Ford Credit.

14. *See* Tr. 28.

Wenner was ever a party to a conspiracy to terminate Tunis Brothers or deny de la Rigaudiere and Smith a Ford franchise.[15]

The facts upon which plaintiffs base their claim that John Wenner tacitly agreed to be a co-conspirator are as follows: (1) a memorandum written in August 1981 by Ford employees in which there is a reference to an attempt to find out if any commitment regarding the Kennett Square area had been made to Wenner;[16] (2) John Wenner was present in the same restaurant when de la Rigaudiere and Smith met with defendant Watson to discuss the possibility of acquiring the Kennett Square Ford franchise after the sale of Tunis Brothers; (3) John Wenner, as expressed by plaintiffs' counsel, "seemed to know" before plaintiffs that plaintiffs' franchise application was going to be rejected;[17] (4) John Wenner is a friend of many of the Ford employee defendants; (5) Tunis Brothers was the only Ford tractor dealership in the Kennett Square area other than Wenner Ford and thus was John Wenner's only competition.[18]

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15. In determing whether a section 1 conspiracy exists between Ford and John Wenner or Wenner Ford, the court is guided by the recent Supreme Court decision *Monsanto Company v. Spray-Rite Service Corporation*, 52 U.S.L.W. 4341 (March 20, 1984). In that distributor-termination case, the court held that in order to submit a section 1 claim to the jury, more than evidence of complaints from other distributors is needed. *Id.* at 4344. The evidence presented must tend to exclude the possibility that the manufacturer and non-terminated distributors were acting independently. *Id.*

16. *See* Tr. 28-29; Plaintiffs' Trial Exhibit P-62.

17. Tr. 31.

18. In addition to these facts that are virtually all subjective, intangible or ambiguous, plaintiffs also cite the unambiguous fact that one of Wenner Ford's trucks was used in an attempt to repossess a Ford tractor from plaintiffs' dealership. However, even plaintiffs apparently concede that this incident is of little value in implicating Wenner in the alleged conspiracy. *See* Tr. 28-33.

Viewed together and in a light most favorable to plaintiffs, these facts do not permit a reasonable inference to be drawn which would place John Wenner in an agreement with any other defendant to terminate Tunis Brothers or deny the transfer of the Ford franchise to de la Rigaudiere and Smith. The facts presented do not warrant a finding that John Wenner was a member of a conspiracy since they do not show, directly or indirectly, a "meeting of the minds" between John Wenner and any of the other defendants. To hold differently would permit a party to use speculation as evidence of participation in an antitrust conspiracy. *See In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 304 (3d Cir. 1983). Because there is simply no evidence, direct or circumstantial, which indicates that John Wenner was a party to the alleged conspiracy, John Wenner cannot be liable under Counts I, III and IV.

(iii) Wenner Ford

Due to the fact that a corporation has no way of acting except through officers and employees, in order for Wenner Ford to be a member of the alleged conspiracy, the facts must indicate or permit a reasonable inference that an employee or officer of Wenner Ford, on behalf of Wenner Ford, agreed with at least one other person or entity to commit the acts complained of by plaintiffs. As seen above, plaintiffs have failed to present sufficient evidence from which this court could infer that John Wenner was a party to the alleged conspiracy. Based on this failure, and on the fact that plaintiffs have not presented any evidence that any other employee of Wenner Ford was a party to the conspiracy, it would normally follow that Wenner Ford could not be a member of the alleged conspiracy. However, in this case, two Ford employees, defendants Fraher and Hasel, have also served, at some time, as directors and officers of Wenner Ford.[19]

19. Although plaintiffs repeatedly note in the papers filed with the court that a number of Ford employees have simultaneously

Because of Fraher's and Hasel's dual employment capacities it is necessary to examine the possibility as to whether Wenner Ford was party to the alleged conspiracy through the acts of Fraher and Hasel.

While it is true that a conspiracy between corporations might arise if directors, officers, representatives or other employees are working for two or more entities, *see Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Tamaron Distrib. Corp. v. Weiner*, 418 F.2d 137 (7th Cir. 1969); *America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F.Supp. 328 (N.D. Ind. 1972), such reasoning is based on the premise that the employees are working on behalf of those corporations. In this case the facts plaintiffs have presented in support of their position that Fraher and Hasel were members of the conspiracy relate solely to activities Fraher and Hasel performed as Ford employees, not as employees of Wenner Ford. There are no facts which indicate that Fraher and Hasel, while working on behalf of Wenner Ford, attempted to terminate Tunis Brothers or prevent the transfer of the Ford frachise to de la Rigaudiere and Smith. Additionally, it would be improper to impute activities performed by Fraher and Hasel in their capacities as Ford employees to Wenner Ford on the sole basis that, at some time, Fraher and Hasel had also served as directors and officers of Wenner Ford. Ford employees routinely act as directors and officers of all Dealer Development dealerships into which Ford has contributed capital. Thus, since there are no facts indicating that a person acting on behalf of Wenner Ford was a

NOTES (*Continued*)

served as employees of Wenner Ford and Ford, plaintiffs only specifically refer to defendants Fraher and Hasel. Therefore, the court will examine the activities of only these two defendants as they relate to the alleged participation by Wenner Ford in the conspiracy. Fraher's and Hasel's involvement as directors and officers of Wenner Ford arises out of the terms of the Dealer Development Agreement in which Wenner Ford was a participant. *See* note 3 *supra*.

co-conspirator for purposes of terminating Tunis Brothers or denying the transfer of the Ford franchise, all counts against Wenner Ford which are based on a section 1 conspiracy under the Sherman Act must be dismissed.

(iv) Ford and the Ford Employees

Having determined that the facts fail to show or give rise to a reasonable inference which shows that Ford Credit, John Wenner and Wenner Ford were parties to a conspiracy, the only remaining defendants that could have been parties to the alleged conspiracy are Ford and the individual Ford employees. However, as noted previously, for purposes of section 1 of the Sherman Act a corporation and its employees, or the employees themselves on behalf of their corporation, cannot conspire.

Therefore, since there is no evidence of a conspiracy under section 1 of the Sherman Act, there is no genuine issue of material fact and all defendants are entitled to judgment as a matter of law on Counts I, III and IV. *See Kaiser v. General Motors Corp.*, 396 F.Supp. 33, 38-39 (E.D. Pa. 1975), *aff'd* 530 F.2d 964 (1976).

B) Count II

In Count II of their complaint plaintiffs allege that the 1974 franchise agreement between Ford and Tunis Brothers was a contract in unreasonable restraint of trade due to the existence of unlawful provisions in the agreement. Plaintiffs contend that the contractual provisions made the franchise agreement illegal both *per se* and under the rule of reason in violation of section 1 of the Sherman Act. Plaintiffs also contend that the defendants other than Ford are liable under this count since they ". . . aided and abetted Ford and conspired with Ford in exercising its rights under said provisions of the agreement . . . and in utilizing said contractual provi-

sions in furtherance of illegal objectives. . . ."[20]

Generally, the provisions in the franchise agreement which plaintiffs claim are unlawful are: 1) a provision which prevented the franchisee, i.e. Tunis Brothers, from transferring the franchise without approval of Ford; and 2) a provision which gave Ford the right to terminate the agreement. Additionally, under the franchise agreement Ford had the right to deny an application for a Ford franchise from any purchaser of the Tunis Brothers business.[21]

It is settled law that a manufacturer is free to choose with whom he will deal absent any agreement restraining trade. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). A refusal to deal, whether it be a dealership termination or a rejection of an application for a dealership, is not a violation of section 1 of the Sherman Act unless the refusal is a result of collusive action between two or more distinct entities. *See Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870 (9th Cir. 1982); *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972). Application of these principles to the franchise agreement and the provisions contained therein requires this court to find that the franchise agreement, on its

20. Complaint, ¶95.

21. More specifically, the actual wording of the subject provisions gave Ford the right to terminate the arrangement between it and Tunis Brothers without notice if there was a transfer or an attempt to transfer any ownership interest in the dealership. Ford could terminate the arrangement at will provided the dealer was given at least sixty (60) days prior written notice. The franchise agreement also provided that any change in an ownership interest would be ineffective against Ford and that Ford could decline to appoint as an authorized dealer any purchaser or prospective purchaser of the dealership upon termination or non-renewal of the agreement.

face, does not violate section 1 of the Sherman Act. *See Kaiser v. General Motors Corp.*, 396 F.Supp. 33, 39 (E.D. Pa. 1975), *aff'd*, 530 F.2d 964 (3d Cir. 1976). The court also determines that there are no facts which show that Ford improperly used the franchise agreement to deny transfer of the Ford franchise to plaintiffs de la Rigaudiere and Smith. *See Salco Corp. v. General Motors Corp., Buick Motor Div.*, 517 F.2d 567, 576 (10th Cir. 1975). Accordingly, defendants' motions for summary judgment as to Count II will be granted.

C) Counts V and VI

Counts V and VI are state law claims over which this court has pendent jurisdiction. In situations where a court dismisses all federal claims before trial, as in this case, it is discretionary with the court to proceed with the pendent claims. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966); *Rogers v. Valentine*, 426 F.2d 1361 (2nd Cir. 1970). The court will dismiss the pendent claims, Counts V and VI, without prejudice. *See Broderick v. Associated Hosp. Serv. of Philadelphia*, 536 F.2d 1, 8 n.25 (3d Cir. 1976); *Daley v. St. Agnes Hospital, Inc.*, 490 F.Supp. 1309, 1320 (E.D. Pa. 1980).

III. CONCLUSION

Since there is no genuine issue as to a material fact in Counts I, II, III and IV, and defendants are entitled to a judgment as a matter of law on those counts, defendants' motions for summary judgment will be granted with respect to Counts I, II, III and IV. The remaining pendent claims, Counts V and VI, will be dismissed without prejudice.

An appropriate Order will be entered.

SUPREME COURT OF THE UNITED STATES

No. 85-487

FORD MOTOR COMPANY, et al.,
Petitioners,

v.

TUNIS BROTHERS COMPANY, INC., et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. (1986).

IT IS FURTHER ORDERED that the petitioners, Ford Motor Company, et al., recover from Tunis Brothers Company, Inc., et al., Two Hundred Dollars ($200.00) for their costs herein expended.

April 7, 1987

Clerk's costs: $200.00

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TUNIS BROTHERS COMPANY, INC., RICHARD N. de la RIGAUDIERE, and DAVID C. SMITH	:	CIVIL ACTION
v.	:	
FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY, WENNER FORD TRACTOR, INC., JOHN S. WENNER, JOHN WATSON, DOUGLAS N. CRAWFORD, EUGENE W. FRAHER, E. S. HASEL, HUGH NICKEL, and KENNETH E. HARRIS	:	NO. 82-5557

ORDER

AND NOW, TO WIT, this 7th day of May, 1984, for the reasons stated in the accompanying Memorandum, IT IS ORDERED that:

1. Defendants' motions for summary judgment are *granted* with regard to Counts I, II, III and IV;

2. Judgment be *entered* in favor of the following defendants on Counts I, II, III and IV: Ford Motor Company, Ford Motor Credit Company, Wenner Ford Tractor, Inc., John S. Wenner, John Watson, Douglas N. Crawford, Eugene W. Fraher, E. S. Hasel, Hugh Nickel, and Kenneth E. Harris;

3. Counts V and VI of the complaint are *dismissed without prejudice*.

LOUIS C. BECHTLE, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.
de la RIGAUDIERE, RICHARD N. and
SMITH, DAVID C.,

Appellants

v.

FORD MOTOR COMPANY
FORD MOTOR CREDIT COMPANY
WENNER, JOHN S.
CRAWFORD, DOUGLAS N.
FRAHER, EUGENE W.
HASEL, E.S.
NICKEL, HUGH
HARRIS, KENNETH E. and
WENZEL, C.W.

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, GREENBERG and HUNTER,
Circuit Judges.

The petition for rehearing filed by defendants/appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judges Weis, Stapleton and Hunter would grant rehearing. Judge Becker would grant rehearing in banc because "the result in this case is inconsistent with" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

BY THE COURT,

_____

Circuit Judge

Dated: August 6, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.
de la RIGAUDIERE, RICHARD N. and
SMITH, DAVID C.,

Appellants

v.

FORD MOTOR COMPANY
FORD MOTOR CREDIT COMPANY
WENNER FORD TRACTOR, INC.
WENNER, JOHN S.
WATSON, JOHN
CRAWFORD, DOUGLAS N.
FRAHER, EUGENE W.
HASEL, E. S.
NICKEL, HUGH
HARRIS, KENNETH E. and
WENZEL, C. W.

Appellees

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*, and DEBEVOISE, *District Judge.**

* Honorable Dickinson R. Debevoise, United States District Court for District of New Jersey, sitting by designation.

The petition for rehearing filed by defendants/appellees Ford Motor Company, Ford Motor Credit Company, Wenner Ford Tractor, Inc., John S. Wenner, John Watson, Douglas N. Crawford, Eugene W. Fraher, E. S. Hasel, Hugh Nickel, and Kenneth E. Harris, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Hunter would grant rehearing for the reasons expressed in his dissent, Judge Weis would grant rehearing, and Judge Garth would grant Ford Motor Company's petition for rehearing.

BY THE COURT,

_____

Circuit Judge

Dated: June 24, 1985

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-745

IN THE

Supreme Court of the United States

October Term, 1987

FORD MOTOR COMPANY, *et al.*,
Petitioners,

v.

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. de la RIGAUDIERE,
and DAVID C. SMITH,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In an antitrust conspiracy case based upon direct evidence as well as circumstantial evidence, did not the Court of Appeals correctly apply the summary judgment standard set forth by this Court in *Matsushita*?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Tunis Brothers Company, Inc. ("Tunis Brothers"),[1] Richard N. de la Rigaudiere ("de la Rigaudiere"), and David C. Smith ("Smith") respectfully request this Court to deny the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered and filed in this action on July 15, 1987.

1. Respondent Tunis Brothers Company, Inc., a Pennsylvania corporation, has no parent company, no subsidiary and no affiliate. Tunis Brothers is wholly owned by respondents de la Rigaudiere and Smith. This statement is made pursuant to Rule 28.1.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, filed July 15, 1987 ("*Tunis Brothers II*"), is reported at 823 F. 2d 49 (3d Cir. 1987) and is reprinted in the Appendix to the Petition for a Writ of Certiorari at A-1 to A-5. A dissenting opinion appears at A-6 and A-7. A petition for rehearing was denied by the Third Circuit's panel and by the Court in banc in an order dated August 6, 1987 (A-70 and A-71).

The judgment of the Third Circuit, dated July 15, 1987, appears in Respondents' Appendix (RA-1 to RA-3) at the end of this Brief in Opposition.

The earlier opinion of the United States Court of Appeals for the Third Circuit, filed May 30, 1985 ("*Tunis Brothers I*"), is reported at 763 F. 2d 1482 (3d Cir. 1985) and is reprinted at A-9 to A-49.[2] A dissenting opinion appears at A-50 to A-52. A petition for rehearing was denied by the Third Circuit's panel and by the Court in banc in an order dated June 24, 1985 (A-72 and A-73).

The judgment of the Third Circuit, dated May 30, 1985, appears at RA-4 to RA-5.

The opinions and judgments of the Third Circuit both in *Tunis Brothers I* and in *Tunis Brothers II* reversed the summary judgment entered by the District Court in favor of the defendants (the petitioners here) on the antitrust counts of the Complaint, reinstated the common law counts[3] dismissed by the District Court

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2. The Third Circuit's opinion in *Tunis Brothers II* stated in part: "Because our initial opinion [in *Tunis Brothers I*] sets forth the facts of this case in great detail . . . we see no need to repeat the record here. We do, however, readopt all aspects of that opinion's factual summary and analysis that are not inconsistent with this opinion" (A-4, n.2). "The legal analysis of our initial opinion was consistent with the requirements of *Matsushita*" (A-5).

3. Count V of respondents' Complaint alleges tort liability under common law based on fraud and other tortious conduct. Count VI alleges contract liability at common law.

without prejudice, and remanded the case to the District Court for trial on all counts.

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, dated May 7, 1984, granting summary judgment in favor of defendants and dismissing the common law counts are reported at 587 F.Supp. 267 (E.D. Pa. 1984) and are reprinted at A-53 to A-67 and at A-69.

STATUTORY PROVISIONS INVOLVED

Respondents brought this antitrust action against petitioners/defendants for treble damages, costs and attorney's fees for injuries to their business and property, pursuant to Section 4 of the Clayton Act (15 U.S.C. §15) by reason of defendants' alleged violations of Section 1 of the Sherman Act (15 U.S.C. §1).[4] Section 1 of the Sherman Act provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

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4. Respondent's antitrust claims under Sections 7 and 14 of the Clayton Act (15 U.S.C. §§18,24) were previously dismissed by the District Court.

STATEMENT OF THE CASE

I.

This is the second time this case comes before this Court upon defendants' petition for a writ of certiorari to the Third Circuit. Twelve days after its decision in *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corporation*, 475 U. S. 574 (1986) ("*Matsushita*"), this Court granted certiorari in *Tunis Brothers I*, vacated the judgment therein and remanded the case to the Third Circuit "for further consideration in light of *Matsushita*". *Ford Motor Company* v. *Tunis Brothers Company, Inc.*, 106 S. Ct. 1509 (1986)(A-68).[5]

Upon remand and such further consideration in *Tunis Brothers II*, the Third Circuit stated at the outset of its opinion written by Circuit Judge Higginbotham:

> This matter is before us on remand from the United States Supreme Court. In our first encounter with this appeal, *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F. 2d 1482 (3d Cir. 1985) ("*Tunis Brothers I*"), we reversed the district court's order granting summary judgment in favor of the appellees and remanded this matter for trial on all counts. On April 7, 1986, the United States Supreme Court vacated that judgment, remanding the matter to us for further consideration in light of *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U. S. 574 (1986) ("*Matsushita*"). *Ford Motor Co. v. Tunis Bros. Co., Inc.*, ____ U.S. ____, 106 S. Ct. 1509 (1986). After considering supplemental briefs and

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5. "[I]t seems fairly clear that the Court does not treat the summary reconsideration order as the functional equivalent of the summary reversal order, and that the lower court is being told to reconsider the entire case in light of the intervening precedent — which may or may not compel a different result." Stern, Gressman and Shapiro, *Supreme Court Practice* (6th ed. 1986) 280. See also *infra* at pp. 19-21.

> memoranda filed by the parties, we conclude that *Matsushita* does not require a new result. We will therefore again reverse the district court's order and remand all counts for trial. (A-2)

Tunis Brothers Company, Inc. v. *Ford Motor Company*, 823 F. 2d 49 (3d Cir. 1987).

In *Tunis Brothers II* the Third Circuit reviewed the summary judgment principles enunciated in *Matsushita*, applied them to the record in this case, and concluded that the evidence produced by plaintiffs/respondents to satisfy their summary judgment burden "meets *Matsushita's* requirements" (A-4), stating in part:

> When we consider, as we must, the record as a whole, appellants' [plaintiffs'] evidence *tends to exclude the possibility that Ford acted independently*, and it shows that an inference of illegal conspiracy between Ford and Wenner Ford is reasonable. This is, in other words, a case where the "antitrust plaintiff[s] raise[] genuine issues of fact as to the existence of a common scheme or commitment, and the unlikelihood of independent action on the part of the defendants[. T]he issue of whether the defendants unlawfully conspired [therefore] belongs with the jury." *Fragale & Sons Beverage Co. v. Dill*, 760 F. 2d 469, 474 (3d Cir. 1985). The legal analysis of our initial opinion [in *Tunis Brothers I*] was consistent with the requirements of *Matsushita*. (A-5) [Emphasis added.]

II.

Contrary to petitioners' assertion (Pet. 3) that this case was brought by "disappointed applicants" for a Ford Motor Company tractor dealership in Kennett Square, Pennsylvania, the plaintiffs are Tunis Brothers Company, Inc., a franchised Ford tractor dealer for 22 years in Kennett Square, the "Mushroom Capital of the World,

until Ford *terminated* its franchise, by trickery and chicanery, in conspiracy with defendant Wenner Ford Tractor, Inc. and others, and refused to give a new Ford tractor franchise to Tunis Brothers and its new owners, plaintiffs Richard N. de la Rigaudiere and David C. Smith, in furtherance of that conspiracy, using dirty business tricks against the three plaintiffs in defrauding each of them.

Under the ownership of Richard M. Tunis and his wife Isabelle, Tunis Brothers was a profitable tractor dealer in Kennett Square under a franchise agreement with Ford Motor Company for 22 years from 1959 until Ford terminated its franchise in April 1981 — notwithstanding Ford's prior assurances to the contrary — after Tunis Brothers was sold in March 1981 to de la Rigaudiere, nephew and employee of Mr. and Mrs. Tunis, and his friend Smith. Ford then refused — notwithstanding its prior assurances to the contrary — to give a new franchise to Tunis Brothers and its new owners.

In December 1982 the plaintiffs commenced this federal antitrust action (with pendent tort and contract claims under common law) against defendants Ford Motor Company ("Ford"), Ford Motor Credit Company ("Ford Credit"), Wenner Ford Tractor, Inc. ("Wenner Ford"), John S. Wenner ("Wenner"), Eugene W. Fraher ("Fraher"), E. S. Hasel ("Hasel"), John Watson ("Watson"), Hugh Nickel ("Nickel"), Douglas N. Crawford ("Crawford") and Kenneth R. Harris ("Harris").

Alleging violations of Section 1 of the Sherman Act (15 U.S.C. §1), and pursuant to Section 4 of the Clayton Act (15 U.S.C. §15), the plaintiffs claim injuries to their business and property in the amount of $7,724,357 and seek treble damages from the defendants in the amount of $23,173,071.

Plaintiffs allege that the corporate and individual defendants conspired (1) to terminate the authorized Ford tractor dealership of plaintiff Tunis Brothers, and further conspired (2) to deny and refuse to give a new

Ford tractor franchise to Tunis Brothers and its new owners, de la Rigaudiere and Smith, in Kennett Square, to eliminate or substantially decrease competition with Wenner Ford, a Ford owned and controlled "dealer development" dealership located 11 miles away, all in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act. Plaintiffs' profitable tractor business was thereby destroyed. Fraud and trickery by Ford and some of its employees is alleged. This termination and refusal involved a conspiracy in which all of the defendants participated.[6]

Defendants' answers denied all of plaintiffs' material allegations.

III.

Following seven months of discovery, involving the production of thousands of papers, the depositions of all parties and others, plus detailed interrogatories and answers, the defendants filed motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, with supporting memoranda, affidavits, depositions and exhibits, seeking summary judgment against plaintiffs on all counts based on what they described as "uncontroverted material facts and applicable principles of law," arguing that "there are no facts showing conspiracy or injury to competition."

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6. The Complaint consists of six counts. Counts I, II, III and IV allege violations of Section 1 of the Sherman Act. Counts V and VI allege pendent state law claims. Counts I, III and IV allege the conspiracy. See RA-6 and RA-7. Count II alleges that the most recent franchise agreement between Ford and Tunis Brothers was a "contract" in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act which Ford, aided and abetted by the other defendants, used improperly to deny transfer of the franchise to de la Rigaudiere and Smith in furtherance of defendants' illegal objectives.

In response, plaintiffs filed and submitted to the District Court a brief, memoranda, affidavits, depositions, some 166 exhibits and other evidence constituting 2,950 pages of the 10-volume record of 3,883 pages submitted to the Third Circuit on appeal.

Following oral argument and without a trial, the District Court granted defendants' motions for summary judgment on plaintiffs' federal antitrust claims and dismissed plaintiffs' pendent state law claims without prejudice (A-69). In its Memorandum and Order of May 7, 1984 (A-53 to A-67) the District Court held that "there is no evidence of a conspiracy under section 1 of the Sherman Act" and, therefore, "there is no genuine issue of material fact and all defendants are entitled to judgment as a matter of law on Counts I, III and IV" (A-69). The District Court also held that "the franchise agreement, on its face, does not violate section 1 of the Sherman Act", that "there are no facts which show that Ford improperly used the franchise agreement to deny transfer of the Ford franchise to plaintiffs de la Rigaudiere and Smith", and "Accordingly, defendants' motions for summary judgment as to Count II will be granted" (A-66 to A-67). Finally, the District Court dismissed Counts V and VI, the state law pendent claims, without prejudice (A-67).

Material facts and significant evidence of conspiracy which plaintiffs presented, analyzed and argued to the District Court in opposition to the summary judgment motion were *completely ignored* or *summarily dismissed* by the District Court in its factually bare Memorandum and Order of May 7, 1984.

As the Third Circuit noted in *Tunis Brothers I* (A-17 to A-18): "[Plaintiffs] strongly take issue with the district court's evaluation of the material facts and staunchly maintain that it failed to examine *all* of the admissible evidence, direct and circumstantial, which they presented in opposition to the defendants' Rule 56 motions.

The plaintiffs contend that the district court did not properly determine *what* legitimate inferences could be drawn as to the ultimate facts in issue. They assail the trial court's conclusions by asking: *Where are the facts?*"

Upon plaintiffs' appeal, the United States Court of Appeals for the Third Circuit reversed the summary judgment entered by the District Court against plaintiffs on the antitrust counts and reinstated the common law counts in an Opinion (A-9 to A-49) and Judgment (RA-4 to RA-5) dated May 30, 1985. The Third Circuit, stated in part (A-18 to A-19):

> Although we recognize that summary judgments are somewhat disfavored in antitrust cases, especially when motive or intent is at issue . . . they are not automatically precluded in antitrust litigation, if otherwise justified . . . Therefore, we have, with painstaking care, reviewed this massive 3,712 page record to ascertain whether it does or does not have the quantum of evidence required to sustain the district court's grant of summary judgment on behalf of the defendants as to Counts I through IV. The critical inquiry is: did the district court err in concluding that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law? . . .
>
> We believe that, in evaluating the evidence contained in this veritable mountain of briefs and appendices, the trial judge, unintentionally of course, tilted the scale *against* plaintiffs by failing to factor into the overall conspiracy equation certain significant evidence that clearly favored the plaintiffs. Therefore, we reverse the entry of summary judgment as to Counts I, III and IV. As to Count II, we also reverse the judgment of the district court, again for the reason that evidence favoring the plaintiffs was not taken into account as to the improper use of the franchise agreement.

IV.

Defendant Wenner Ford Tractor, Inc., located in Concordville, Pennsylvania, about 11 miles east of Kennett Square, was the authorized Ford tractor dealer nearest Tunis Brothers. Wenner Ford is a Ford Dealer Development Company, established by Ford in November 1979, in which defendant Ford Motor Company owns all of the voting preferred stock representing 79% of the equity stock. Defendant John S. Wenner owns all of the non-voting common stock, representing 21% of the equity stock. Wenner operates Wenner Ford as its president and chief executive officer pursuant to a Dealer Development Agreement and a Management Agreement (A-13). Though Ford's Dealer Development Program contemplates that Wenner will buy out Ford's investment within a reasonable time and become a private dealer (A-13, n. 6), documentary evidence offered by plaintiffs reflect Ford's concern that it receive a certain return on its $187,500 preferred stock investment and full redemption thereof, plus interest on its $187,500 loan to Wenner Ford and repayment thereof, before Ford's ownership and domination of Wenner Ford would ever terminate. *Ford Motor Company has always had a vested interest in Wenner Ford's financial success.*

Ford has always been in complete control of the management and operation of Wenner Ford through its board of directors and officers (all of whom were Ford employees except for Wenner) and through the very tight control and restriction of Wenner Ford (and Wenner's operation thereof) reserved to and exercised by Ford through agreements between Ford, Wenner Ford and Wenner.

At all times Wenner Ford's board has consisted of three directors, one of whom has always been Wenner and the other two have always been employees of Ford Motor Company, one of whom has always been either

defendant *Eugene W. Fraher* or defendant *E. S. Hasel,* the two *who decided on behalf of Ford to terminate Tunis Brothers and refuse plaintiffs a new franchise.* The Senior Vice President of Wenner Ford has *always* been either *Fraher* or *Hasel.* They were *not* simply "nominal" directors and officers of Wenner Ford, as the dissenting judge suggests (A-51). Hasel and Fraher were *the* top Senior Vice Presidents of Wenner Ford and they were intimately involved in the management of Wenner Ford and its business details. See *infra* p. 27. The Third Circuit answered the dissenting judge: "Whether Hasel and Fraher were 'nominal' officers of Wenner Ford is a question of disputed fact. The power to vote is the power to destroy." (A-41, n.25)

John S. Wenner was employed by Ford Motor Company's Tractor Operations in Michigan from 1973 to 1977 as Parts Operations Manager at an annual salary of $52,000 plus bonuses in 1977 (A3240, 3245).[7] In June 1977 Wenner acquired a Ford tractor dealership in Concordville which he operated as a private dealership. Though he made some dramatic gains in sales volume, a severe cash shortage soon forced him to seek help from Ford's management personnel, some of whom he apparently knew well from his employment years with Ford. Among the Ford employees who tried to help Wenner overcome his dealership troubles were defendants John Watson and Hugh Nickel. Ultimately, they and defendant Fraher, who was then Ford's District Manager, helped Wenner convert his private dealership into a Ford Dealer Development Company. H. W. Stoneback, Manager of the Philadelphia Branch of Ford Motor

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7. References herein to a number preceded by the letter "A" (*without* a hyphen (-) separating the letter and number) are references to the 10-volume Appendix to "Brief of Appellants" filed with the Court of Appeals by the respondents. References to a number preceded by the letter "A" (*with* a hyphen (-) separating the letter and number) are references to the Appendix to the Petition for a Writ of Certiorari.

Credit Company, cooperated with Nickel in securing the necessary credit for Wenner.

V.

When plaintiffs de la Rigaudiere and Smith began negotiating with Mr. and Mrs. Tunis in 1980 to purchase Tunis Brothers, they met with defendant Watson, then Ford's Zone Manager for an area including Kennett Square and Concordville, to tell him of their plans and of their desire to be Ford franchised dealers at Tunis Brothers in Kennett Square. *With Wenner eavesdropping*, as he and Watson apparently prearranged (all of which they deny), Watson told de la Rigaudiere and Smith that he liked the idea of their being Ford dealers but *not* in Kennett Square. He wanted them to move 15 miles west to the Cochranville area. Watson told them that he no longer wanted a dealer in Kennett Square. Watson admits (A116) that "he told them of Ford's plans to eliminate its Kennett Square tractor dealership as soon as Richard Tunis decided to leave the business of running Tunis Brothers Company, Inc."

Watson told them, according to de la Rigaudiere and Smith, that "he thought that Mr. Wenner could do a better job than Tunis Brothers", "because he was so close to Tunis Brothers, he could take over that territory" (A1567), that "he no longer wanted a dealership in the Kennett Square area because this territory belonged to Wenner Ford" (A1917), that "Kennett Square territory was to belong to Wenner Ford Tractor at the end of Tunis' dealership." (A1919) (A2142, 2377). Watson denied making these statements (A-26).

Following his meeting with plaintiffs, Watson wrote to his superiors that "These two young men appear to be very well qualified to represent us in this trade area", referring to Oxford-Cochranville, not Kennett Square (A-26; A2779-80).

Believing that Wenner and Watson had been collaborating, de la Rigaudiere and Smith decided to meet with defendant Fraher, who was Ford's District Manager and Watson's superior. When they met in June 1980, plaintiffs did not know, and Fraher did not tell them that he was then a director and the Senior Vice President of Wenner Ford and that Ford controlled and had a substantial stock interest in Wenner Ford (A-27). Plaintiffs testified that Fraher agreed with what Watson had previously told them. Fraher said that "Kennett Square was going to be Wenner's territory" and that Fraher "didn't want his dealers competing with each other" (A2149). Fraher told plaintiffs that he wanted them to establish a Ford dealership either in Cochranville or Oxford, rather than in Kennett Square. He liked the idea of plaintiffs being Ford dealers, but not in Kennett Square (A1579). Fraher later testified: "I really like those two guys, and I wanted them as a dealership. But I wanted them in . . . Cochranville" (A1337).

Finally, as a compromise, Fraher agreed and assured plaintiffs at this meeting that they could have the Ford tractor dealership at Tunis Brothers in Kennett Square for two or three years at the end of which time plaintiffs would move to Cochranville or Oxford. (A1579-80, A1935-40, A2145-6, A2148-9). At the end of their meeting, Fraher gave de la Rigaudiere and Smith dealer applications and told them to apprise him of the progress of their sale negotiations with Mr. Tunis (A-28).

Plaintiffs continued their purchase negotiations, reported on their progress to Fraher by letter in September 1980 (A-28) and, after a low purchase price of $450,000 had been negotiated with favorable mortgage financing, an Agreement of Sale for Tunis Brothers was signed by Mr. and Mrs. Tunis, de la Rigaudiere and Smith in December 1980 (A2787-9). In January 1981 de la Rigaudiere wrote a letter to Fraher (A2857-8) with "the proposal that you requested which presents our goals

and ideas concerning the Ford franchise and an eventual move to the Cochranville area", reporting also that he and Smith expected to become the sole owners and managers of Tunis Brothers within 60 days. This letter explained how plaintiffs planned to develop sales in the area between Kennett Square and Cochranville while they operated the Tunis Brothers dealership in Kennett Square. With this letter de la Rigaudiere enclosed his and Smith's personal financial statements, a copy of the Agreement of Sale, plaintiffs' business plan, a copy of mortgage financing approval from the local Industrial Development Authority, and a 54-page explanatory document (A-28 to A-29; A2790-2846). Their letter to Fraher concluded: "If you have any questions or comments, please contact us in care of Tunis Brothers." The same material was mailed by de la Rigaudiere in January 1981 to defendant Douglas N. Crawford, who had succeeded Watson as Ford's Zone Manager (A-29, A1666-7).

VI.

Plaintiffs never received any reply from Fraher or anyone else to the letter and material de la Rigaudiere mailed him and Crawford in January 1981. However, the morning of March 3, 1981 de la Rigaudiere received a telephone call from Crawford saying that he and Hugh Nickel from Ford Motor Company in Michigan would be coming to Tunis Brothers that afternoon to take plaintiffs' application. In that telephone conversation Crawford said "that Mr. Fraher was sending him" (A1668). Crawford testified (A1292-4) that it was Fraher who telephoned him, instructed him to pick up Nickel at the airport, and told him to go to Tunis Brothers and elsewhere with Nickel to take several dealer applications (A1292-4). Crawford further testified (A1303-4) that Hugh Nickel told plaintiffs at the meeting on March 3, 1981 at Tunis Brothers in Crawford's presence that

Fraher had "requested" and "instructed" Nickel to come and take their application for a franchise dealership. Fraher testified (A1338-1341) that he did not call Crawford. Defendant Nickel was then a Dealer Placement Representative in the Northern Region of Ford Tractor Operations, with offices in Troy, Michigan, where defendant Fraher was then Assistant Regional Manager.

At this March 1981 meeting at Tunis Brothers, attended by Mr. and Mrs. Tunis, de la Rigaudiere, Smith, Nickel and Crawford, after inquiring and being told that the Tunis Brothers sale would be settled within two or three weeks, Nickel stated that the first order of business was for Tunis to sign an *unconditional letter of resignation* and termination notice on behalf of Tunis Brothers as a Ford dealer, to be typed on Tunis Brothers stationery in accordance with a form letter Nickel presented, immediately after settlement, and send it to Nickel at Ford Motor Company. Nickel stated that this was required by Ford before it could act on the new application of de la Rigaudiere and Smith for them to operate Tunis Brothers as a Ford dealership in Kennett Square. Nickel emphasized that this resignation and termination letter would *not* be acted upon or made effective *until* the application of the new owners of Tunis Brothers (de la Rigaudiere and Smith) for a Ford franchise was *approved*, which, Nickel assured and reassured them, *would be approved*. In the meantime, until such approval, Nickel stated, this resignation and termination letter would be "*kept in a drawer*" and *not* acted upon or made effective. [See A-29 to A-30; and deposition testimony of de la Rigaudiere (A1950-4, A1673-5), Smith (A2158-62), Isabelle de la R. Tunis (A2661-2) and Richard M. Tunis (A2556-9).] Nickel told plaintiffs that Ford Motor Credit Company (as well as Ford Motor Company) would approve them (A1675).

After discussing the unconditional resignation he wanted Mr. Tunis to sign, Nickel gave plaintiffs *blank* application forms he asked them to sign for Ford Motor

Company and Ford Motor Credit Company, which they did. Nickel stated that he would have the forms typed up in his office in Michigan and then return them to plaintiffs for their review before submitting them. Plaintiffs never saw these papers again before they were submitted. Subsequently, after their applications had been rejected, plaintiffs discovered that Nickel had, in completing the applications signed by plaintiffs in blank, supplied information that plaintiffs were investing in the Tunis Brothers business only $2,500 each whereas in fact, as they had informed Nickel at their March 3, 1981 meeting when they signed these papers in blank and gave him the information to type up, they were each putting $25,000 into the business at settlement (A-30, A-31, A-42) (A1954-62, A2159-60).

During their meeting on March 3, 1981, neither Nickel nor Crawford mentioned any move to Cochranville or Oxford or any time limit on the franchise in Kennett Square. Nickel assured plaintiffs that they were going to be Ford tractor dealers in Kennett Square (A1959-62, A2162). In his Affidavit (A1215-16) de la Rigaudiere stated: "We talked only about Tunis Brothers in Kennett Square. Our application was for a Ford tractor dealership in Kennett Square. Therefore, it was very clear to me not only that Mr. Fraher was confirming his assurance to us of June 1980 that we would be approved as Ford tractor dealers at Tunis Brothers in Kennett Square but also that Mr. Fraher was not now placing any time limit as to when we would have to move to Cochranville. I thought that he was so impressed with our business plans that he had decided to let us stay in Kennett Square indefinitely."

Mr. and Mrs. Tunis, de la Rigaudiere and Smith all made it clear in their respective affidavits that none of them would have signed their Agreement of Sale or, having signed it, would have consummated the purchase and sale of Tunis Brothers except in reliance upon Ford's assurances given by Fraher in June 1980 and by

Nickel in March 1981 that plaintiffs would be given a Ford tractor franchise at Tunis Brothers in Kennett Square. They all relied on those assurances (A1225-29, A1213-19, 1188-95).

In reliance thereon, plaintiffs and Mr. and Mrs. Tunis closed the purchase and sale of Tunis Brothers on March 16, 1981 and Mr. Tunis signed an *unconditional* resignation and termination notice on behalf of Tunis Brothers, dated March 17, 1981, in the form prescribed by Nickel on behalf of Ford (A2929, A-31).

Despite the assurances he gave plaintiffs that their dealer applications would be approved, Hugh Nickel submitted a negative written report to his superiors concerning his meeting with plaintiffs and their application (A2860-1), stating that he had met with de la Rigaudiere and Smith to take their dealer application, that the Kennett Square location was "too close to Concordville" [Wenner Ford] and that "I do not feel that [Smith and de la Rigaudiere] are qualified as businessmen nor is their net worth or financial strength adequate enough to qualify for a line of credit." Nickel's "recommendation" was to "terminate the [Tunis Brothers] franchise . . . especially if FMCC [Ford Credit] refuses a line of credit" (A-30, A2860-1).

Upon receipt of Tunis' "resignation" (A2929) defendant Nickel handprinted a request (A2972, A1018) that the Market Representation Manager "accept dealer resignation" of Tunis Brothers "*immediately*". This request was then typed (A2980), dated 3/23/81, and signed by defendant Eugene W. Fraher. As Fraher was authorized to do, he signed the name of defendant E. S. Hasel, the Regional Manager, to this request for *immediate* acceptance of Tunis Brothers' "resignation" (A-31, A1019, A1343-4). By letter dated March 23, 1981 (A2973), addressed to Mr. Tunis, receipt of the "resignation" was acknowledged by Fraher, who signed Hasel's name to the letter.

Without first sending plaintiffs for their review the applications he had filled out after they signed in blank, Nickel sent these applications, with false investment information he had inserted, to Howard W. Stoneback, Jr., Philadelphia Branch Manager of Ford Motor Credit Company. When Stoneback telephoned Nickel about the small $5,000 investment by de la Rigaudiere and Smith, this false information was immediately confirmed by Nickel who also told Stoneback that he and his associates at Ford Tractor were "*not* confident" about plaintiffs. Nickel "also implied that [Ford Tractor] did *not* want the deal approved" and that transfer of Tunis Brothers ownership without Ford Tractor's approval "was reason for the franchise to be terminated" (A3112). Thereupon, Stoneback recommended that Ford Credit should reject plaintiffs' application and he telephoned this recommendation to defendant Harris, who was Nickel's superior (A1330). Harris then arranged for the immediate acceptance of Tunis Brothers' "resignation" (A1330-1). This was done immediately and Tunis Brothers' franchise was terminated effective April 2, 1981 (A2981).

When plaintiffs subsequently discovered that Tunis Brothers' franchise had been terminated and that their application had been rejected by Ford Credit because of the false financial information supplied by Nickel, they took steps to prepare a new application to Ford Credit which Harris helped process. Both Harris and his superior, W. L. Heck, Ford's Regional Marketing Manager, approved granting plaintiffs a franchise in Kennett Square. In a concurring memo, Heck wrote in part: "These people (Rigaudiere, Smith, Mr. & Mrs. Tunis) have completed all actions outlined by the N.E. District management [headed by Fraher] during 1980 as being required to change over the dealership and to meet the requirements necessary to secure the Ford sales agreement. . . . I can find no written commitment to *John Wenner* concerning this location. It was in no way part

of the D.D. [Dealer Development] package . . . I believe we are bound to process the attached application . . . Tell *Wenner* in writing of our plan." [Emphasis added.] (A3069-83)

When Harris and Heck went to defendant Fraher on August 5, 1981 for his concurrence, *Fraher refused and vigorously opposed granting plaintiffs a Ford dealership in Kennett Square.* They then went into the office of Regional Manager E. S. Hasel who, after hearing the arguments of Harris and Heck in support of plaintiffs' application and the opposing arguments of Fraher, agreed with Fraher and made the decision to reject plaintiffs' second application for a franchise in Kennett Square (A407-411, 360-2). On that date, August 5, 1981, Hasel was the Senior Vice President and a Director of Wenner Ford Tractor, Inc., a nearby competitor of Tunis Brothers. Prior to January 5, 1981 and beginning again on January 4, 1982, Fraher was the Senior Vice President and a Director of Wenner Ford.

Following this decision by Fraher and Hasel to reject plaintiffs' second application, Harris telephoned Ford Credit to advise that Ford Tractor was rejecting plaintiffs and withdrawing or rescinding their second credit application sent to Ford Credit on July 28, 1981. By letter dated August 7, 1981 (A3084), Hasel advised plaintiffs that "the Northern Region of Ford Tractor Operations has decided not to approve your application for a dealership in Kennett Square."

REASONS FOR DENYING THE PETITION

I. This Court's Remand Order Did Not Require the Court of Appeals to Reach A Different Result.

Preliminarily, the remand order of this Court did not require the Court of Appeals to reach a different result in *Tunis Brothers II*. "[I]t seems fairly clear that the Court does not treat the summary reconsideration order as the functional equivalent of the summary reversal order,

and that the lower court is being told to reconsider the entire case in light of the intervening precedent — which may or may not compel a different result." Stern, Gressman and Shapiro, *Supreme Court Practice* (6th Ed. 1986) 280.

In reporting on his extensive study of the Court's reconsideration order cases, Professor Hellman concludes: "The Courts that have been directed to reconsider their prior decisions are . . . correct in thinking that a remand order 'should not be read as implying that [the cited authority] necessarily mandates reversal. [Rather,] the Court has merely "flagged" [the remanded case] as one upon which the intervening decision may have some bearing . . .' "[8] Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Constitutional Law Quarterly 5, 19-20 (1983).

Professor Hellman found that in a substantial number of the remanded cases the courts of appeals, upon

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8. Citing *Bush v. Lucas*, 647 F. 2d 573, 575 (5th Cir. 1981), *affirmed*, 462 U.S. 367 (1983), where the Fifth Circuit stated: "This case is on remand from the Supreme Court for further consideration in light of *Carlson v. Green*, 446 U.S. 14 . . . (1980). . . . After due consideration of supplemental briefs filed by the parties, we conclude that *Carlson* does not dictate a contrary result. Summary judgment for defendant is therefore reaffirmed. ¶We note at the outset that our reconsideration of this case proceeds on the assumption that the Supreme Court's one-sentence order vacating and remanding *Bush* should not be read as implying that *Carlson* necessarily mandates reversal. It is our understanding in this type of remand that the Court has merely 'flagged' this case as one upon which the intervening decision may have some bearing, but which the Court has not conclusively determined to be materially affected thereby." Subsequently, this Court granted certiorari and *affirmed* the Fifth Circuit in *Bush v. Lucas*, 462 U.S. 367 (1983), agreeing that *Carlson* did not dictate a different result even though it had remanded the case for further consideration in light of *Carlson*. 462 U.S. at 371-2.

further consideration, adhered to their original judgments, and that very few of these reinstated judgments were subsequently reversed by this Court. Hellman, *supra*, at 17-19; Hellman, *"Granted, Vacated, and Remanded ***": Shedding Light on a Dark Corner of Supreme Court Practice*, 67 Judicature 389, 394-95 (1984); and Stern, Gressman and Shapiro, *supra*, at 280 n. 76.[9]

Thus, petitioners' concern (Pet. 9) that "the Third Circuit has not changed its holding in this case," "*despite* remand by this Court," is unwarranted.

II. The Third Circuit Correctly Applied the Summary Judgment Standard Set Forth by this Court in *Matsushita*.

A.

Upon further consideration of this matter in light of *Matsushita*, the Third Circuit Court of Appeals correctly concluded in *Tunis Brothers II* that *Matsushita* did not require a new result and that the Third Circuit's legal analysis in *Tunis Brothers I* was consistent with the requirements of *Matsushita* which was decided by this Court after *Tunis Brothers I*.

In its second opinion in *Tunis Brothers II* (A-1 to A-5) the Third Circuit first summarized the applicable

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9. In *Buckingham Corp. v. Odom*, a distributor termination case in the Ninth Circuit, this Court remanded "for further consideration in light of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. ___ (1984)" shortly after the *Monsanto* decision. See No. 82-1787 and 46 *Antitrust & Trade Regulation Report* 675, 718 (April 5, 1984). Upon reconsideration, the Ninth Circuit reinstated its earlier judgment overturning a directed verdict for the liquor distiller. See 47 *ATRR* 478 (September 13, 1984). Thereafter, the Court *denied* certiorari notwithstanding a strong dissenting opinion upon reconsideration in the Ninth Circuit based upon *Monsanto*. See 48 *ATRR* 1111 and 1133 (June 27, 1985). The opinions of the Ninth Circuit were not published.

summary judgment principles enunciated in *Matsushita,* stating in part (A-2 to A-3):

> *Matsushita* addresses the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case. The plaintiff in such a case must produce evidence tending to show a conspiracy in violation of the antitrust laws and, in addition, tending to show injury to the plaintiff resulting from such illegal conduct. In general terms, according to *Matsushita,* the plaintiff's evidence must create more than "some metaphysical doubt as to the material facts." . . . 106 S. Ct. at 1356. If in the factual context of the case the plaintiff's claim is implausible — that is, if the plaintiff's "story . . . does not make sense" as a matter of economic theory . . . — then the plaintiff "must come forward with more persuasive evidence to support the [ ] claim than would otherwise be necessary." . . . 106 S. Ct. at 1356.
>
> Of particular relevance to this appeal is the *Matsushita* Court's statement that, if the antitrust defendant's conduct is consistent both with permissible competition and with illegal conspiracy, evidence of such conduct "does not, standing alone, support an inference of antitrust conspiracy." . . . 106 S. Ct. at 1357. In such a situation, "[t]o survive a motion for summary judgment . . ., a plaintiff seeking damages for a violation of [Sherman Act] §1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 764 (1984)). In other words, such a plaintiff "must show that the inference of [illegal] conspiracy is reasonable in light of the competing inferences of independent action or

collusive action that could not have harmed [the plaintiff]". *Id.*

The Third Circuit then stated in *Tunis Brothers II* that in "[a]pplying *Matsushita's* summary judgment principles to this record" (A-4), "we see no need to repeat the record here" "[b]ecause our initial opinion [in *Tunis Brothers I*] sets forth the facts of this case in great detail" (A-4, n. 2). The Third Circuit specifically incorporated by reference in *Tunis Brothers II* its factual summary and analysis in *Tunis Brothers I*, stating: "We do, however, readopt all aspects of that opinion's factual summary and analysis that are not inconsistent with this opinion." *Id.*

Stating that, "if one carefully prunes the record to uncover select facts," it can be said that "Ford's termination of the Tunis Ford tractor dealership is as consistent with an inference of permissible independent action by Ford . . . as it is with an inference of illegal conspiracy involving Ford," the Third Circuit noted that in this situation "*Matsushita* teaches that it is [plaintiffs'] burden at the summary judgment stage to produce evidence that tends to exclude the possibility that Ford acted independently and thus to show that an inference of illegal conspiracy is reasonable in light of the competing inference of independent action" (A-4).

Basing its conclusion upon "the record as a whole" (A-5), the Third Circuit concluded: "The evidence adduced by [plaintiffs] to satisfy this burden is substantial but not overwhelming; we conclude that it meets *Matsushita's* requirements. (A-4) . . When we consider, as we must, the record as a whole, [plaintiffs'] evidence tends to exclude the possibility that Ford acted independently, and it shows that an inference of illegal conspiracy between Ford and Wenner Ford is reasonable . . . The legal analysis of our initial opinion was consistent with the requirements of *Matsushita*." (A-5)

Since the Third Circuit's opinion in *Tunis Brothers II* integrates and relies upon the Court's initial opinion in *Tunis Brothers I* (A-9 to A-49), it is essential that both opinions be read together when considering the Petition for Certiorari and our opposition thereto.

The magnificent 40-page opinion of the United States Court of Appeals for the Third Circuit in *Tunis Brothers I* (like its opinion in *Tunis Brothers II*) was written by Circuit Judge A. Leon Higginbotham, Jr., a highly regarded member of the federal appellate judiciary.

B.

The conspiracies alleged by plaintiffs and the conspiratorial relationships and liability of the co-conspirators are well defined and analyzed by the Third Circuit in its opinion in *Tunis Brothers I* (A-33ff). As the Court stated (A-33): "The plaintiffs take the position that Ford and Wenner Ford conspired with each other and with all of the individual defendants, both employees and non-employees; that all of the individual defendants conspired with each other; and that Ford Credit conspired with Wenner Ford and with all of the individual defendants. The only change in position on appeal is that plaintiffs no longer contend that Ford conspired with Ford Credit, its wholly-owned subsidiary."

In addition to Wenner Ford's obvious conspirarcy with Ford *through Fraher and Hasel*, who were officers and directors of Wenner Ford at the same time they were making management decisions for Ford against the plaintiffs, we contend that Wenner Ford was conspiring with Ford and with Ford Credit *through Hugh Nickel* and with Ford *through Watson and Wenner*.

We also contend that the individual defendants Wenner, Fraher, Hasel, Nickel, Watson, Harris and Crawford conspired with their respective corporations

and employers and, as the Court stated (A-35), "fall within the exception to the general rule because each had an 'independent personal stake' in achieving the allegedly illegal objective of their respective corporations and the conspiracy."

The Court further noted (A-35 to A-36, n. 22): "As to Ford and John Wenner, plaintiffs allege that John Wenner's 'independent personal stake' was in achieving the elimination of Tunis Brothers as a competing Ford tractor dealer in Kennett Square through the termination of its franchise by Ford and the rejection, both by Ford and Ford Credit, of the applications for a new franchise and for wholesale credit by plaintiffs de la Rigaudiere and Smith. They allege an *economic motivation* given the fact that Wenner owned all of the common stock in Wenner Ford, representing 21% of its equity stock. The same rationale would apply to Wenner Ford and John Wenner."[10]

C.

The principal conspiracy in this case was between defendants Ford Motor Company and Wenner Ford Tractor, Inc. And the principal actors in that conspiracy were defendants Fraher and Hasel.

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10. The Court also noted (A-36, n. 22): "As to Ford and the other individual Ford employees, plaintiffs allege that their personal motivation and stake was not monetary gain but the product of loyalty and allegiance to John Wenner, a former Parts Operations Manager of Ford's Tractor Operations in Michigan before he acquired the privately-capitalized Ford franchise in which defendants Watson, Nickel and Fraher were closely involved when Wenner experienced a major financial crisis. The same motive is suggested as to Wenner Ford and individual Wenner Ford employees, Fraher and Hasel." See *supra* pp. 11-12. Fraher and Hasel were also motivated by their responsibilities as corporate officers of Wenner Ford.

Moreover, the record and summary of facts herein furnish *direct* evidence (as well as circumstantial evidence) of that conspiracy and the very clear, principal involvement of Hasel and Fraher therein.

The very existence of that *direct* evidence here completely destroys the stated basis of the Petition for Certiorari which presents the Question (Pet. i) "In an antitrust conspiracy case *based upon circumstantial evidence* . . .," which argues (Pet. 9) that the Third Circuit in this case "perpetuates important antitrust law in conflict with the standard established by this Court for inferring an antitrust conspiracy from *circumstantial* evidence" and which states (Pet. 9-10): "In *Matsushita,* this Court sets forth specifically the standards lower courts must apply when deciding whether to grant summary judgment in antitrust conspiracy cases that do *not* involve *direct* evidence of conspiracy. . . . *Matsushita* and *Monsanto* therefore require courts, when faced with a motion for summary judgment in a Section 1 conspiracy case with *no direct evidence* of conspiracy, to examine the competing inferences derived from the available ambiguous evidence." (Emphasis added.)

In *Matsushita* this Court emphasized that there was *no* "*direct* evidence" there of a conspiracy that injured plaintiffs. See 475 U.S. 574, 106 S. Ct. 1348, 1354, 1361 (1986). See also *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d. 1335, 1338 (3d Cir. 1987).

The record in this case clearly established by *direct* evidence that, in August 1981, notwithstanding the recommendation of their Ford subordinates, Fraher refused and vigorously opposed granting plaintiffs a Ford dealership in Kennett Square and Hasel agreed with Fraher and made the decision on behalf of Ford to reject plaintiffs' application for a franchise in Kennett Square (A407-411, 360-2, *supra* p. 19). In March and April 1981, through false pretenses, fraud and dirty tricks, Fraher, acting for Hasel, had terminated the franchise of

Tunis Brothers and rejected plaintiffs' application for a new franchise. (See pp. 14-18 *supra.*)

At those times, Hasel was not only a management official of Ford but also *the* Senior Vice President and a director of Wenner Ford. Prior to January 1981 and beginning again in January 1982 Fraher was *the* Senior Vice President and a director of Wenner Ford.

As noted *supra* p. 11, Fraher and Hasel were *not* simply "nominal" directors and officers of Wenner Ford. They were intimately involved in its management and business details.[11] When Ford placed Fraher and Hasel on Wenner Ford's board of directors and made them Senior Vice Presidents of Wenner Ford, it was not intended that they should be only corporate figureheads at Wenner Ford. It is reasonable to infer that Fraher and Hasel were mindful of their corporate obligations as

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11. A review of Wenner Ford's corporate minutes and resolutions signed by *Fraher* as one of Wenner Ford's three directors discloses that he participated in corporate decisions of Wenner Ford with respect to its specific credit line limits (A3814), election of certain officers (A3816-7), purchase by Wenner Ford of a $5,300 Rollback truck bed (A3820), purchase, financing and/or trade of nine specific trucks at specified prices by Wenner Ford (A3821-7), election of officers (A3833), purchase of a Ford truck for $13,949.71 (A3835), purchase of a machine and cabinet for $1,566.74 (A3836), adoption of Standards of Corporate Conduct (A3837), purchase of a Ford van for $3,198.35 (A3838), authorization to John S. Wenner to spend $1,200.85 to upgrade lighting in the parts and service areas (A3840), authorization to Wenner to borrow $25,000 from a bank as short term working capital (A3841), purchase of a new truck for $11,342 and sale of used vehicles for a total of $2,450 (A3842), purchase of a new automobile for $7,102.72 (A3843), election of an Assistant Secretary (A3844), and election of Hasel as a director and Vice President (A3846). A review of Wenner Ford's corporate minutes and resolutions signed by *Hasel* as one of Wenner Ford's three directors discloses that he participated in corporate decisions of Wenner Ford with respect to the sale of certain mowers, cabs and trailers (A3851), a salary adjustment for Wenner (A3852), the purchase of a used Ford Pinto for $3,286 (A3853), the election of officers (A3859-60, A3861), and the reelection of Fraher (A3863).

officers and directors of Wenner Ford when they terminated the Kennett Square franchise of Tunis Brothers and rejected plaintiffs' application for a new franchise there. They conspired for both companies when they acted. As the Third Circuit stated in *Tunis Brothers II*, "there is substantial evidence from which it can be inferred that Ford, acting with Wenner Ford Tractor, Inc., engaged in trickery and chicanery in order to eliminate Tunis [Brothers] as a competitor of Wenner Ford" (A-5).

Ford's motivation to eliminate plaintiffs from competition with Wenner Ford in the Kennett Square area is not difficult to understand. Unless and until Wenner bought Ford out after a period of years, Ford had a very substantial financial investment of $375,000 in Wenner Ford which Ford wanted to protect. Protecting Ford's interest in Wenner Ford was of paramount concern to Ford, a concern they did not have in Tunis Brothers, a privately-financed dealer. Hasel and Fraher were thinking both of Ford and of Wenner Ford when they did what they did.

Though petitioners contend (Pet. 14-15) that Wenner Ford "had no economic motive to eliminate Tunis Brothers" and "nothing to gain therefrom" and was not interested in the Kennett Square "mushroom market", the facts are otherwise. Wenner testified at his deposition (A1271) that he looked to the Kennett Square area as a potential market for his Ford products operating out of Concordville, and that he knew, before he acquired the Concordville dealership, that he would be competing with Tunis Brothers (A1263). Moreover, following the termination of Tunis Brothers' franchise and the rejection of plaintiffs' franchise application by Ford in 1981, Wenner Ford advertised aggressively for the business of mushroom growers in the Kennett Square area. (A3699-3700, A3701-4 and A3705-6)

Though petitioners contend (Pet. 15) that Wenner Ford's disinterest in the Kennett Square market is

evidenced by the fact that Wenner Ford "relocated farther away from Kennett Square" after Tunis Brothers was terminated, the fact is that Wenner Ford stayed in Concordville moving only two miles away (A3704, A3708).

The record does not support petitioners' contention that "the need for Ford to discontinue its Kennett Square site had independent business validity" (Pet. 13). Tunis Brothers was a profitable Ford tractor dealer in Kennett Square (*supra* p.6). Comparing Tunis Brothers' sales performance with that of Ford dealers within a 60-mile radius of Kennett Square, including those in much larger cities and towns, is obviously unfair and unrealistic.

If Ford was really concerned by plaintiffs' "lack of financial soundness", why was Ford so interested in giving plaintiffs a Ford franchise in the Cochranville area? Plaintiffs were in fact financially sound.

The Third Circuit stated: "From our reading of the record, . . . [defendants'] articulated business justification raises disputed issues of fact. Furthermore, we cannot reconcile this 'plausible explanation' with the conduct of the defendants that fell short of 'proper business practices.' " (A-43 to A-44)

On the other hand, the Third Circuit concluded that plaintiffs present a "plausible" view of the facts (A-32). The Third Circuit also stated: "We believe that the plaintiffs have submitted evidence which could lead a jury to believe that the decision to terminate was *not* made *unilaterally* on the part of Ford" (A-37).

D.

The Third Circuit correctly set forth and applied in this case the *Matsushita* summary judgment standard. There is no justification whatsoever for the fears and false alarms sounded by the Petition for Certiorari. This is a factually complicated case with keenly disputed

issues of fact. As the Third Circuit stated (A-49): "disputed issues of material fact as to motive, intent and conflict of interest permeate this record". Petitioners' imprudent suggestion that "Review by this Court is necessary to prevent the undermining of *Monsanto* and *Matsushita* and to provide a necessary elaboration of the policies and standards implicit in those decisions" (Pet. 23) disregards the time-honored reasons for granting certiorari and the necessary limitations of judicial restraint. This is not a case which needs or warrants certiorari. This is a case which needs a trial by jury.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARNOLD R. GINSBURG
500 College Avenue
Haverford, Pennsylvania 19041
Attorney and Counsel of Record
for Respondents

January 4, 1988

RESPONDENTS' APPENDIX

RESPONDENTS' APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.
de la RIGAUDIERE, RICHARD N. and
SMITH, DAVID C.,

Appellants

v.

FORD MOTOR COMPANY
FORD MOTOR CREDIT COMPANY
WENNER FORD TRACTOR, INC.
WENNER, JOHN S.
WATSON, JOHN
CRAWFORD, DOUGLAS N.
FRAHER, EUGENE W.
HASEL, E.S.
NICKEL, HUGH
HARRIS, KENNETH E. and
WENZEL, C.W.

(D.C. Civil No. 82-5557)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ON REMAND FROM THE SUPREME COURT OF
THE UNITED STATES

Present: HUNTER and HIGGINBOTHAM, *Circuit Judges* and DEBEVOISE, *District Judge**

---

*Hon. Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 15, 1985. By Opinion and Judgment filed May 30, 1985 this Court reversed the judgment of the District Court and remanded the cause for trial on all counts. 763 F.2nd. 1482 (3rd Cir. 1985). By order dated April 7, 1986 the Supreme Court granted the appellees' petition for writ of certiorari, vacated this Court's judgment and remanded the cause for further consideration in light of *Matsushita Electric Industrial Co., Ltd. vs. Zenith Radio Corp.* 475 U.S. 574 (1986). *Ford Motor Co. vs. Tunis Bros. Co., Inc.*, ____ *U.S.* ____, *106 U.S. 1509, 89 L.Ed. 2d 909 (1986).*

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgments of the said District Court entered May 7 and 8, 1984 be and the same are hereby reversed as to Counts I, II, III and IV. It is further ordered and adjudged that counts V and VI will be reinstated and the cause remanded to the said District Court for trial on all counts.

Costs taxed against the appellees.

ATTEST:

/s/ SALLY MRVOS

CLERK

July 15, 1987

Costs taxed in favor of the appellant as follows:

Docketing Fee	$ 65.00
Appendix	2,151.30
Brief	69.00
Suppl. Brief on Remand	73.76
Reply Brief	181.99
TOTAL	$2,541.05

Certified as a true copy and issued in lieu of a formal mandate on August 14, 1987.

Test: /s/ M. ELIZABETH FERGUSON

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.,
de la RIGAUDIERE, RICHARD N., and SMITH, DAVID C.,
Appellants

v.

FORD MOTOR COMPANY; FORD MOTOR CREDIT COMPANY; WENNER FORD TRACTOR, INC.; WENNER, JOHN S.; WATSON, JOHN; CRAWFORD, DOUGLAS, N.; FRAHER, EUGENE, W.; HASEL, E.S.; NICKEL, HUGH; HARRIS, KENNETH E. and WENZEL, C.W.

(D.C. Civ. No. 82-5557)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Present:
HUNTER and HIGGINBOTHAM, *Circuit Judges*
and DEBEVOISE, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 15, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered May 7, 1984 and May 8, 1984, be, and the same are hereby reversed as to Counts

---

*Honorable Dickinson R. Devoise, United States District Court for the District of New Jersey, sitting by designation.

I, II, III and IV. It is further ordered and adjudged that Counts V and VI will be reinstated and that the cause is remanded to the said District Court for trial on all counts. Costs taxed against the appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS
Clerk

May 30, 1985

Cost taxed in favor of appellants as follows:

Docketing Fee	$ 65.00
Appendix	2,151.30
Brief	69.00
Reply Brief	181.99
TOTAL	$2,467.29

Certified as a true copy and issued in lieu of a formal mandate on July 2, 1985.

Test: /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

SUMMARY OF COMPLAINT'S CONSPIRACY COUNTS

Count I alleges that Ford's refusal to consent to the transfer of the Tunis Brothers franchise to new qualified owners, its refusal to approve plaintiffs' application for a franchise in Kennett Square, and its termination of Tunis Brothers' dealership and franchise, were *not only pursuant to a conspiracy* among all the defendants but were all *in furtherance of an illegal horizontal territorial restriction* by Ford in a situation where *Ford itself was in a horizontal relationship with Tunis Brothers*, occupying the *dual role of both franchisor and competitor*, by reason of Ford's stock and investment interest in defendant Wenner Ford. Therefore, Count I claims that said conspiracy and actions were not only in unreasonable restraint of trade but were illegal *per se*.

Count III incorporates the allegations of Count I but adds that "Said franchise agreement and the acts, representations, statements, conduct and conspiracy of defendants complained of herein included *dirty business tricks and unfair business dealing* on the part of Ford and the other defendants with respect to the plaintiffs, and each of them, in furtherance of defendants' illegal antitrust objectives and their unreasonable restraint of trade and in violation of Section 1 of the Sherman Act". The cause of action alleged in Count III constitutes *both* a *per se* and a *rule of reason* violation.

Count IV alleges facts constituting an unreasonable restraint of trade, within the meaning of *the rule of reason, in violation of Section 1 of the Sherman Act*. Count IV alleges *injury to competition*, contending that "Said franchise agreement and the acts, representations, statements, conduct and conspiracy of defendants complained of herein, leading to, making possible, in furtherance of, and resulting in the termination of the Ford dealer franchise of plaintiff Tunis Brothers and the refusal by Ford to consent to the transfer of said franchise to plaintiffs [de la] Rigaudiere and Smith or to

grant them a new dealer franchise at the location of Tunis Brothers *eliminated intrabrand competition* in the sale and service of Ford products in which Tunis Brothers had been engaged under its franchise agreement and since 1959 in the market place of Tunis Brothers [the Kennett Square area] and in the market place of defendant Wenner Ford Tractor, Inc., eliminating Tunis Brothers and its new owners as a competitor of Wenner Ford, in which Ford had an investment interest." Court IV further alleges that "*No inter-brand competition* of any significance or consequence *was promoted* by such elimination of intrabrand competition primarily because of the *dominant position of Ford* and its tractors and agricultural equipment and replacement parts, and the overwhelming demand therefor in plaintiffs' marketplace", as evidenced by plaintiffs' lack of success subsequently in trying to sell another brand (Allis-Chalmers) in competition with Ford's products sold by Wenner Ford. Count IV concludes that "The completely *anticompetitive effect on intrabrand competition* of defendants' acts, representations, statements, conduct and conspiracy and of said termination and refusal by Ford, *without* any significant *pro-competitive effect on interbrand competition*, constituted an unreasonable restraint of trade, within the meaning of the rule of reason, in violation of Section 1 of the Sherman Act."

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No. 87-745

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FORD MOTOR COMPANY, et al.,

Petitioners

v.

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. DE LA RIGAUDIERE,
and DAVID C. SMITH,

Respondents

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In their Brief in Opposition to the Petition for a Writ of Certiorari, Tunis Brothers attempts to dissuade this Court from reviewing the decision below by boldly mischaracterizing this case as one involving "direct evidence" of conspiracy. There is no support for that in the record. In fact, neither the Third Circuit nor the District Court ever referred to any direct evidence of conspiracy; the issue has always been how to treat respondents' ambiguous, circumstantial evidence in the context of petitioners' motion for summary judgment.

Under *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986), unless the ambiguous circumstantial evidence is more consistent with illegal conspiracy than lawful, independent conduct, summary judgment is properly granted against plaintiffs. Tunis Brothers tries to pull this case out of the *Matsushita* mold by characterizing the evidence as direct, not circumstantial. But given that neither the Third Circuit nor the District Court ever found any direct evidence of conspiracy, the real issue remains whether, upon remand by this Court, the Third Circuit has appropriately followed *Matsushita*.

Despite the voluminous record in this case,[1] Tunis Brothers relies on only one piece of evidence to support its unique contention that this case involves "direct evidence" of conspiracy. That evidence is the highly inconclusive fact that two Ford employees who opposed plaintiffs' dealership application, Messrs. Fraher and Hasel, also served as directors and officers of Wenner Ford.[2] (Brief in Opp. 26-27). Implicitly conceding the ambiguous import of that fact, respondents argue that "[i]t is reasonable *to infer* that Fraher and Hasel were mindful of their corporate obligations as officers and directors of Wenner Ford when they . . . rejected plaintiffs' application . . ." and that, therefore, "they conspired for both companies when they acted." *Id.* 27-28 (emphasis added). In other words, respondents

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1. The record below consists of 16 depositions and thousands of pages of documents produced by defendants.

2. This is not unusual. Ford employees routinely act as directors for Dealer Development dealerships since Ford policy requires Regional Managers to be officers of every Dealer Development corporation in their region. Fraher and Hasel, for example, served on 10 Dealer Development boards (including Wenner's).

Although not expressly citing it as direct evidence, Tunis Brothers places great reliance on the fact that John Wenner had lunch in a local restaurant at the same time as plaintiffs were lunching with Ford representatives. The record is clear that John Wenner was there simply to have lunch and not to meet with Ford. As such, the mere coincidence of Wenner and Ford people being in the same restaurant at the same time is, at best, circumstantial evidence of plaintiffs' alleged conspiracy — particularly because plaintiffs themselves were present and seated with the Ford personnel.

infer that Fraher and Hasel acted simultaneously in two capacities — on behalf of Ford and Wenner Ford — when they acted to reject Tunis Brothers' application for the Kennett Square location.

That allegedly critical evidence is highly ambiguous on at least two levels. First, it is ambiguous and inconclusive with regard to the claim that those Ford employees were acting in any capacity other than as Ford employees. Respondents can only speculate — as they do — that Fraher and Hasel were acting for Wenner Ford when they rejected the Tunis Brothers' application; for not even respondents can point to any direct evidence of that.[3] They argue, without any direct support, that it is reasonable to infer that those men were acting for Wenner Ford as well as Ford. That speculation, however, is contrary to the conclusion of the District Court which expressly found that there was no evidence that Ford employees were acting in any capacity other than as Ford employees when they decided to deny plaintiffs' application. (A-64).[4]

Second, there is no evidence that Fraher and Hasel "conspired" with anyone when they recommended that Tunis Brothers' application be denied. There is no evidence of any meetings, discussions, agreements, or any communications whatsoever between Ford and Wenner Ford regarding plaintiffs' application.[5] Rather, the record establishes that the deci-

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3. Direct evidence is, of course, "evidence, which if believed, proves the existence of a fact in issue *without inference* or presumption." *Black's Law Dictionary* 413 (5th ed. 1979) (emphasis added).

4. As Judge Hunter noted in his dissenting opinion in *Tunis II*, the fact that Fraher and Hasel were both Ford Motor employees and nominal directors of Wenner Ford establishes at most "the opportunity to conspire" and does not, without more, create a jury question on the issue of concerted action. (A-7). Anybody can infer whatever he wants, but ambiguous, circumstantial inferences do not outweigh the direct evidence of independent, unilateral conduct by Ford to deny Tunis Brothers' application

5. If there had been any such direct evidence, the Third Circuit would have so noted, as it did recently in *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335 (3d Cir. 1987). In *Arnold Fontiac*, the Third Circuit found that the case was factually distinguishable from *Matsushita* because it involved direct evidence of conspiracy in the form of a memorandum, describing a

sion to deny the Tunis Brothers application was made independently and in good faith by Ford employees alone. Respondents do not contend that John Wenner was involved in the decision. Nor could they, because in the words of John Wenner:

> At no time before or since I became President of Wenner Ford have I had communications with any employees of Ford Motor Company, Ford Motor Credit Company or anyone acting in their behalf in which I complained about Tunis Brothers Company, Inc., Richard Tunis, David Smith or Richard de la Rigaudiere.
>
> At no time have I ever communicated with any employee of Ford Motor Company, Ford Motor Credit Company or anyone acting in their behalf in which I sought termination of Tunis Brothers. . . . In fact, at no time have I ever been asked about my opinion concerning the need for a Ford tractor dealership in Kennett Square nor was I ever consulted concerning the application of David Smith and Richard de la Rigaudiere to become authorized Ford tractor dealers in Kennett Square.[6]

The conspiracy as now alleged by Tunis Brothers is actually by Mr. Fraher with himself, allegedly acting in two different capacities (and by Hasel with himself in the same two different capacities). Certainly it is highly problematic for Tunis Brothers to assert that a person can conspire with himself. Moreover, the evidence that either Fraher or Hasel acted in two capacities (for Wenner Ford and Ford) is, as both the District Court and Third Circuit have implicitly observed, highly ambiguous and inconclusive. *Matsushita* is therefore directly applicable. It mandates that to avoid summary judgment a plaintiff must present evidence that conspiracy is more plausible than independent action. The mere existence of indirect, ambiguous evidence

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meeting between the various co-conspirators. *Id*. at 1338. The record in this case contains no such direct evidence of conspiracy.

6. Affidavit of John Wenner accompanying defendants' Motion for Summary Judgment, para. 7, 8.

supporting an inference of conspiracy is not enough for plaintiffs to overcome defendants' motion. 106 S.Ct. at 1356.

As set forth in detail in the petition for certiorari, although the Third Circuit found that the record supported the conclusion that "Ford's termination of the Tunis Ford tractor dealership is as consistent with an inference of independent action by Ford Motor Company as it is with an inference of illegal conspiracy,"[7] contrary to *Matsushita*, it relieved plaintiffs of their burden of proving that, on balance, an inference of conspiracy is *more* plausible than independent action. Immediate review by this Court is necessary to prevent the undermining of *Matsushita* and the consequent injury to competition policy that will arise if factfinders are permitted to infer conspiracies on the basis of implausible, ambiguous evidence such as exists in this case.

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7. Thus, even the Third Circuit would disagree with respondents' outlandish statement that "the record does not support petitioners' contention that 'the need for Ford to discontinue its Kennett Square site had independent business validity.' " (Brief in Opp. 29).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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and DAVID C. SMITH,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION

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Tunis Brothers Company, Inc. v. Ford Motor Company, 763 F.2d 1482 (3d Cir. 1985) (*Tunis Brothers I*) ..... *passim*

Tunis Brothers Company, Inc. v. Ford Motor Company, 823 F.2d 49 (3d Cir. 1987) (*Tunis Brothers II*) ..... *passim*

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION

After we filed our Respondents' Brief in Opposition to the Petition for Certiorari in this case, the relevant and significant opinion of the United States District Court for the Southern District of New York in *Minpeco, S.A. v. Conticommodity Services, Inc.* ("Minpeco") was reported on January 11, 1988 in 673 F. Supp. 684 (S.D.N.Y. November 17, 1987).

This was an action alleging, *inter alia,* an antitrust conspiracy violating Sections 1 and 2 of the Sherman Act on the part of defendant silver futures traders and their brokerage houses to manipulate upward the price of silver and silver futures. Two defendant traders and three defendant brokers[1] moved for summary judgment on the ground that plaintiffs' evidence was "at least as consistent with legitimate, independent action as with participation in a conspiracy" (673 F. Supp. at 687). District Judge Lasker denied the motions for summary judgment stating in part (673 F. Supp. at 686):

> Although these well-briefed and argued motions present difficult and close questions, I conclude that the record contains sufficient evidence from which a reasonable jury could find that these five defendants participated in a conspiracy to manipulate silver prices. The jury, aided by the live testimony of witnesses subject to cross-examination, must decide whether the moving defendants[2] participated in the conspiracy alleged. Accordingly, the motions for summary judgment are denied.

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1. Merrill Lynch, Pierce, Fenner & Smith, Inc.; Prudential-Bache Securities, Inc.; and ACLI International Commodity Services, Inc. All footnotes in this Supplemental Brief have been added by respondents. They are not part of the *Minpeco* opinion.

2. The moving defendants were represented by Sullivan & Cromwell; Rogers & Wells; Debevoise & Plimpton; Curtis, Mallet-Prevost, Colt & Mosle; and Kaye, Scholer, Fierman, Hays & Handler.

Before discussing and evaluating the facts relating to each of the moving defendants and their respective arguments, Judge Lasker set forth the standards to be applied in considering motions for summary judgment as follows (673 F. Supp. at 687-9):

> Three recent Supreme Court decisions — *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348, 89 L. Ed. 2d 538 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and *Celotex Corporation v. Catrett*, 477 U. S. 317, 106 S. Ct. 2548, 91 L. Ed. 265 (1986) — and a recent opinion of the Court of Appeals for this circuit, *Apex Oil Co. v. DiMauro*, 822 F. 2d 246 (2d Cir. 1987), articulate the standards to be applied in motions for summary judgment under Fed. R. Civ. P. 56.
>
> The Supreme Court has stressed that to establish a "genuine issue for trial" on a motion for summary judgment, the non-moving party must show more than "some metaphysical doubt as to the material facts," *Matsushita*, 106 S. Ct. at 1356. The *Matsushita* court made clear that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party there is no 'genuine issue for trial.' " *Accord, Anderson*, 106 S. Ct. at 2511 (threshold inquiry is whether "there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party").[3]

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3. This Court emphasized in *Anderson* (106 S. Ct. at 2511) that "Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is *not himself to weigh the evidence and determine the truth of the matter* but to determine

However, while *Matsushita* and *Anderson* stand for the proposition that the trial court must carefully scrutinize the record to determine whether genuine issues for trial exist, the Supreme Court has also reaffirmed [in *Anderson*] that:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are *jury* functions, *not* those of a *judge*, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Neither do we suggest that the trial courts should act other than with caution in granting summary judgment* or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. (Emphasis added).[4]

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whether there is a genuine issue for trial. . . . There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining *whether there is the need for a trial* — whether, in other words, there are any *genuine factual issues* that properly can be resolved only by a finder of fact *because they may reasonably be resolved in favor of either party*." Noting that "the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard," this Court also stated in *Anderson* (106 S. Ct. at 2512): "In essence . . . the inquiry under each is the same: whether the evidence presents a *sufficient disagreement* to require submission to a jury or whether it is *so one-sided* that one party must prevail as a matter of law." (Emphasis added.)

4. This Court further emphasized in *Anderson* (106 S. Ct. at 2513) that "Our holding that the . . . [applicable] standard of proof should be taken into account in ruling on summary judgment motions *does not denigrate the role of the jury*. It by no means authorizes trial on affidavits." In concluding its discussion of the non-moving plaintiff's burden under Rule 56, this Court stated once again in *Anderson* (106 S. Ct. at 2514-15): "We repeat, however, that the plaintiff, to survive the defendant's motion, need

Anderson, 106 S. Ct. at 2513-14 (citations omitted); *accord*, *Apex*, 822 F. 2d at 253 ("question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at trial").[5]

To establish that the moving defendants participated in the antitrust conspiracy alleged, Minpeco must present direct or circumstantial evidence that reasonably tends to prove that the defendants had a conscious commitment to a common scheme to achieve an unlawful objective. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S. 752, 764, 104 S. Ct. 1464, 1470, 79 L. Ed. 2d 775 (1984); *Apex*, 822 F. 2d at 252. In determining whether a plaintiff has produced sufficient evidence to prove such a commitment, *Matsushita* and *Apex* clarify that "antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 [Sherman Act] case." *Matsushita*, 106 S. Ct. at 1357; *accord*, *Apex*, 822 F. 2d at 252.

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only present evidence from which a jury *might* return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." (Emphasis added.)

5. More fully, the Second Circuit noted in *Apex Oil Co. v. DiMauro*, 822 F. 2d 246, at 252-3 (2d Cir. 1987) that "while summary judgment is a valuable means for avoiding unnecessary trials, and recent Supreme Court as well as Second Circuit cases have tended to encourage its use in complex cases such as this one, . . . it should not be regarded as a substitute for trial. Thus, while the Supreme Court has indicated that trial courts should draw only reasonable inferences in favor of the non-moving party viewing the evidence as a whole, . . . and while some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of *what weight should be assigned to competing permissible inferences* remains within the province of the fact-finder at a trial." (Emphasis added.) This Court denied certiorari in *Apex* (No. 87-633) on December 7, 1987 (56 United States Law Week 3400).

> First, "conduct as consistent with permissible conduct as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 106 S. Ct. at 1357; *accord, Apex*, 822 F. 2d at 252. There must be evidence in the record that "tends to exclude" the possibility that the alleged conspirators were acting independently, rendering the inference of conspiracy reasonable in light of the competing inferences of independent action. *Matsushita*, 106 S. Ct. at 1357; *Apex*, 822 F. 2d at 252. * * * Second, the economic plausibility of the plaintiff's claims is relevant to a determination whether genuine issues exist for trial: if the claim is one that "simply makes no economic sense," the plaintiff must come forward with more persuasive evidence to support its claim than would otherwise be necessary. *Matsushita*, 106 S. Ct. at 1356. Furthermore, in the antitrust context: "[l]ack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id.* at 1361.

Applying the foregoing principles to the facts in *Minpeco*, Judge Lasker denied the summary judgment motions of all moving defendants, noting that "This case — like *Apex* — turns on the competing inferences that may reasonably be drawn from largely undisputed facts. Once it is concluded that the record supports a reasonable inference that each moving defendant participated in the alleged conspiracy, it is for the jury to choose between Minpeco's version of events and that of the defendants." (673 F. Supp. at 689).

The competing inferences in this *Tunis Brothers* case are even more for a jury to resolve than in *Minpeco* where there were "largely *undisputed* facts". Not only

did the defendants deny all material allegations of plaintiffs (A-15), but the Third Circuit noted that "there are numerous factual questions unresolved in this case" (A-32) and that "disputed issues of material fact as to motive, intent and conflict of interest permeate this record" (A-49).

The *Minpeco* opinion is helpful in restating the summary judgment standards of *Matsushita* and *Anderson* and in stressing *Anderson's* emphasis of the respective functions of judge and jury on summary judgment motions. *Minpeco* is also helpful in its careful analysis of the facts presented in that antitrust case in light of those standards and judge-jury functions, and in its application of the principles thus stated by this Court.

1. In examining the motives and sometimes conflicting or competing motivations of the various defendants, the court concluded that this was *not* a case in which plaintiff Minpeco's conspiracy claim as to a defendant "simply makes no economic sense" (673 F. Supp. at 692), or where "there was no rational economic motive to conspire" (*Id.* at 694), or where a defendant's "alleged participation in the conspiracy is wholly implausible" (*Id.* at 695). As to another defendant, the *Minpeco* court found that "a jury could reasonably infer" that, "despite his sworn denial to the contrary, [he] had participated in the conspiracy" (*Id.* at 697). Although the explanation of another defendant was "plausible, it is subject to a conflicting, reasonable interpretation that his participation in the conspiracy explains [his] seemingly inconsistent conduct" (*Id.* at 698).

Since the factual context in *Minpeco* did not make the plaintiff's claim "implausible", since that conspiracy claim was not one that "simply makes no economic sense" (as was the case in *Matsushita*), the *Minpeco* court did *not* find it necessary or proper to apply the *Matsushita* requirement that plaintiffs "must come forward with *more persuasive evidence* to support their

claim than would otherwise be necessary" (*Matsushita*, 106 S. Ct. at 1356) (Emphasis added.)

It should be noted that *Matsushita* speaks only of "more *persuasive*", not "more *plausible*" evidence. Petitioners misread *Matsushita* when they state in their Reply Brief (p. 4) that *Matsushita* "mandates that to avoid summary judgment a plaintiff must present evidence that conspiracy is more *plausible* than independent action", and when they state in their Petition (p. 11) that "Plaintiff must show that conspiracy is more *plausible* than independent action." Unlike the factual situation in *Matsushita* where this Court found that defendants had no plausible motive to conspire and plaintiffs' claim made no economic sense, the Third Circuit concluded in this *Tunis Brothers* case that plaintiffs present a "plausible" view of the facts (A-32). The motivation of defendants Ford Motor Company and Wenner Ford Tractor, Inc. to conspire to eliminate plaintiffs from competition with Wenner Ford in the Kennett Square area made economic sense from defendants' viewpoint.

2. In concluding that the evidence adduced by plaintiffs in this case to satisfy their summary judgment burden "meets *Matsushita's* requirements", the Third Circuit stated that this evidence is "substantial but not overwhelming" (A-4). Similarly, in *Minpeco* the court concluded that, although plaintiff's conspiracy evidence as to one defendant was "not in itself overwhelming, . . . when considered together with [other] evidence . . . it is sufficient to permit a reasonable juror to conclude that [this defendant] participated in the conspiracy" (673 F. Supp. at 699).

Notwithstanding the repeated efforts of defendant petitioners to belittle plaintiffs' evidence, the Third Circuit found that "the evidence can be interpreted as disclosing a vertical conspiracy between Ford and the Wenner Ford dealership to eliminate Tunis as a Wenner

Ford competitor" (A-4), that plaintiffs' evidence is "substantial" (A-4), and that "Instead of simply terminating the Tunis dealership in a straightforward manner in order to streamline its dealership structure, there is *substantial evidence* from which it can be inferred that Ford, acting with Wenner Ford Tractor, Inc., engaged in trickery and chicanery in order to eliminate Tunis as a competitor of Wenner Ford. The evidence shows that Ford had a substantial financial interest in Wenner Ford. It also shows that two Ford employees, [defendants] Fraher and Hasel, served as directors and officers of Wenner Ford. In addition, there is evidence from which one may conclude that Ford employees tricked Tunis into resigning and caused de la Rigaudiere's and Smith's application for the Kennett Square Ford tractor dealership to be rejected due to false financial information that Fraher had inserted into their dealership application. When we consider, as we must, the record as a whole, [plaintiffs'] evidence tends to exclude the possibility that Ford acted independently, and it shows that an inference of illegal conspiracy between Ford and Wenner Ford is reasonable" (A-4 to A-5).

After reviewing "with painstaking care . . . this massive 3,172 page record", the Third Circuit stated, *inter alia*, in the course of its long factual summary in *Tunis Brothers I*, that "The plaintiffs make a compelling argument that Wenner Ford conspired with Ford through defendants Fraher and Hasel" (A-41); that "the evidence presented supports an inference that the close ties between defendants Hasel and Fraher and defendants Ford and Wenner Ford led to an illegal agreement, even if implicit" (A-42); that the trial judge failed to factor into the overall conspiracy equation "certain significant evidence that clearly favored the plaintiffs" (A-19); and that "plaintiffs have submitted evidence which could lead a jury to believe that the decision to terminate was not made *unilaterally* on the part of Ford" (A-37).

3. In *Minpeco* the defendants each contended that their respective activities were independent and non-conspiratorial in nature. The *Minpeco* court found that there were competing inferences of a conspiracy that should be submitted to a jury.

Ford claims that its termination of the Tunis Brothers franchise in Kennett Square and its rejection of plaintiffs' application for a new franchise there were unilateral decisions on the part of Ford and consistent with its long-standing marketing plan and strategy for the elimination of a dealership in Kennett Square. The Third Circuit was skeptical of this, stating (A-43 to A-44): "From our reading of the record, however, this articulated business justification raises disputed issues of fact. Furthermore, we cannot reconcile this 'plausible explanation' with the conduct of the defendants that fell short of 'proper business practices.' . . . Are we to assume that the allegedly falsified credit applications of de la Rigaudiere and Smith and the allegedly fraudulent inducement of Mr. Tunis to submit an unconditional resignation is conduct consistent with the implementation of a legitimate business purpose?" Though the franchise agreement between Ford and Tunis Brothers gave Ford the right to terminate the franchise at will (Pet. 4), Ford's alleged market plan was to terminate it "as soon as Mr. Tunis retired or resigned" (A-43; A-26). This explains Ford's "trickery and chicanery" (A-5) in precipitating the "retirement" of Mr. Tunis.

4. Plaintiffs produced both *direct* and *circumstantial* evidence. Our *direct* evidence, which the Third Circuit noted (A-17 and A-41) and which its opinions and the record reflect throughout, should be considered when determining the applicability of *Matsushita*. However, upon remand the Third Circuit has clearly and correctly set forth (A-1 to A-5) the summary judgment principles enunciated in *Matsushita* and summarized in *Minpeco*, and then applied them correctly in this case in

the light of all the evidence and the competing inferences presented. The Third Circuit has carefully and faithfully followed and applied *Matsushita*.

5. The Third Circuit has also been very mindful in this case of the respective functions of judge and jury on summary judgment motions as emphasized in *Anderson* and noted in *Minpeco*. See pp. 2-4 *supra*. The Third Circuit properly reversed the summary judgment in favor of defendants. A trial by jury, not a summary judgment, is what the facts and law require here. As Judge Higginbotham stated in *Tunis Brothers II* (A-5): "When we consider, as we must, the record as a whole, [plaintiffs'] evidence *tends to exclude the possibility that Ford acted independently*, and it shows that an inference of illegal conspiracy between Ford and Wenner Ford is reasonable. This is, in other words, a case where the 'antitrust plaintiffs raise genuine issues of fact as to the existence of a common scheme or commitment, and the unlikelihood of independent action on the part of the defendants. The issue of whether the defendants unlawfully conspired [therefore] belongs with the jury.' "

CONCLUSION

For the reasons stated above and in our Respondents' Brief in Opposition, the petition for a writ of certiorari should be denied.

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